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I. Introduction

Title VII of the Civil Rights Act of 1964[1] proscribes discrimination in employment on the basis of an individual's race, color, religion, sex or national origin.[2] The original version of the Act defined

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, Tit. VII, §§ 701-16(c), 78 Stat. 253 (codified at 42 U.S.C. § 2000e to e-15 (1970), *amended by* 42 U.S.C. §§ 2000e to e-17 (Supp. IV 1974)) [hereinafter cited as *The Act*].

2. *The Act, supra* note 1, provides in pertinent part:

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin.

42 U.S.C. § 2000e (1976).

Writers generally acknowledged that the primary purpose of Title VII consisted of eliminating *racial* discrimination in employment. *See, e.g.,* Edwards & Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII,* 69 MICH. L. REV. 599, 599-600 (1971); *Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1113-14 (1971). Other categories of discrimination, however, have also received judicial scrutiny. *See, e.g.,* General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (denial of pregnancy benefits not discrimination on basis of sex); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (refusal to hire a non-U.S. citizen not discrimination on basis of national origin); Ochoa v. Monsanto Co., 473 F.2d 318 (5th Cir. 1973) (company's hiring practices not discrimination on basis of national origin); Morris v. Texas & Pac. Ry., 387 F. Supp. 1232 (M.D. La. 1975) (hair length regulation not discrimination on basis of sex).

The legislature included religion as a prohibited criterion for discrimination in Title VII partially because the Civil Rights Act parallels state fair employment practices legislation, which typically prohibits religious discrimination. *See, e.g.,* KAN. STAT. ANN. § 44-1001

neither "religion" nor "discrimination." In 1966, however, the Equal Employment Opportunity Commission (EEOC)[3] issued guidelines to clarify the meaning of the statute.[4] These original guidelines allowed an employer to establish a normal work schedule regardless of the impact it had on the religious observances of some employees.[5] A year later, the EEOC issued new guidelines[6] that required an employer to make reasonable accommodations to the religious needs of employees unless such accommodations would cause undue hardship to the employer.[7] The guidelines did not define either "reasonable accommodation" or "undue hardship," but left their interpretation to the EEOC's review of each case to facilitate an equitable application of the guidelines to the variety of situations

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(1981); OR. REV. STAT. § 659-030 (1981). The inclusion also reflects a recognition of religious freedom as a fundamental right in American society.

Religion differs from the other discriminatory criteria in that it is not immutable. Unlike race, color, and national origin, which never change, or sex, which usually does not change, people often change their religion, either by outright conversion, *e.g.,* Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973), or by a growing conviction within their present faith, *e.g.,* Dewey v. Reynolds Metals Co., 300 F. Supp. 709 (W.D. Mich. 1969), *rev'd,* 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court,* 402 U.S. 689 (1971).

3. Responsibility for the administration of Title VII falls upon the EEOC. The EEOC's authority enables it to receive charges of discrimination, to investigate such charges, and, when it has reasonable cause to believe a charge, to attempt to eliminate the alleged discriminatory employment practice by informal conciliation and persuasion. If conciliation fails, the charging party may sue in Federal district court.

4. The 1966 guidelines state in part:

> [T]he duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate to the reasonable religious needs of employees and . . . prospective employees where such accommodation can be made without serious inconvenience to the conduct of the business. However . . . an employer is free under Title VII to establish a normal work week generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees.

31 Fed. Reg. 8370 (1966).

5. *Id.*

6. 29 C.F.R. § 1605.1 (1981).

7. Guidelines for observation of the Sabbath and other religious holidays consist of the following:

> (a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays during the year and, as a consequence, do not work on such days.
>
> (b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.
>
> (c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.
>
> (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the various religious practices of the American people.

29 C.F.R. § 1605.1 (1980).

that could arise due to the varied religious practices of the American people.[8]

Judicial opinions questioned the validity of the EEOC's new interpretation of the Civil Rights Act of 1964. Critics argued that the guidelines conflicted with the purpose of the Act because Congress had intended to regulate only discriminatory practices, and failure to make accommodations did not constitute a discriminatory practice.[9] Congress clarified its intention in 1972 when it added the following definition to the 1964 Act: "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[10]

The potential impact of this section is substantial. The definition may force an employer to renegotiate a union contract that requires scheduling a worker for days to which he objects on religious grounds.[11] It may further require an employer to violate a labor contract by assigning more senior employees to Saturday work.[12] The broad language protecting "all aspects of religious observance and practice, as well as belief" may encompass employees who object to making particular products, to shaving, or to joining a union in a closed shop.[13] The validity and effect of this requirement therefore concerns all employers.

This article will first review the steps leading to congressional adoption of the "reasonable accommodation" requirement, and will then examine the ways in which failure to accommodate an employee may interfere with his free exercise of religion as protected by the first amendment.[14] The article next examines the following principal areas in which an employee's religious beliefs may conflict with an employer's rules and procedures: (1) observance of the Sabbath; (2) religious requirements regarding appearance and attire; (3) religious prohibitions relating to food, innoculations, etc.; and (4) religious scruples antithetical to union membership. After discussing the extent to which an employer must "accommodate" an employee's religious needs, and what constitutes "undue hardship" to

8. *Id.* See Edwards & Kaplan, *supra* note 2, for a discussion of the problems existing prior to the 1972 amendment to Title VII with emphasis on arbitration problems.

9. Dewey v. Reynolds Metals Co., 429 F.2d 324, 334 (6th Cir. 1970) (dictum), *aff'd by an equally divided court,* 402 U.S. 689 (1971); *see* Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), *rev'd,* 464 F.2d 1113 (5th Cir. 1972).

10. 42 U.S.C. § 2000e(j) (Supp. II 1976), *amending* 42 U.S.C. § 2000e (1970).

11. *See* Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Or. 1973).

12. *See* Scott v. Southern Cal. Gas Co., 7 Fair Empl. Prac. Cas. 1030 (C.D. Cal. 1973).

13. Cummins v. Parker Seal Co., 516 F.2d 544, 559 (6th Cir. 1975) (dissenting opinion).

14. U.S. CONST. amend. I states in part: "Congress shall make no law . . . prohibiting the free exercise [of religion]."

the employer,[15] the article considers whether the "reasonable accommodation" requirement constitutes an "establishment of religion" in violation of the first amendment.[16]

II. The Statutory Requirement

A. Development of the Statutory Reasonable Accommodation Requirement

In 1970, *Dewey v. Reynolds Metals Company*[17] presented the first challenge to the accommodation rule of the 1967 EEOC guidelines. In *Dewey,* plaintiff-employee was discharged for refusing to work on Sunday, his Sabbath. He alleged that his discharge violated Title VII. Defendant-employer asserted that it had acted in compliance with a collective bargaining agreement requiring all employees to perform all work required of them by the company, and further, that the company had permitted Dewey to find a substitute for his Sunday work.[18]

The trial court found for plaintiff, stating that the company had failed to reasonably accommodate Dewey's needs.[19] The Court of Appeals for the Sixth Circuit reversed on the grounds that the 1967 guidelines were not in force at the time of Dewey's discharge. It further stated that even if the guidelines had been effective, defendant had reasonably accommodated Dewey by allowing him to find a substitute.[20] The court also cast doubt on the validity of the guidelines in light of the first amendment. "It is settled that the government in its relations with religious believers and non-believers, must be neutral. The government is without power to support, assist, favor or handicap any religion."[21] The Supreme Court of the United States affirmed the Sixth Circuit's decision without opinion.[22]

In response to *Dewey,* Congress amended Title VII[23] to incorpo-

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15. The discussion of undue hardship will include the effect of a union contract. *See infra* notes 182-207 and accompanying text.

16. U.S. CONST. amend. I states in part: "Congress shall make no law respecting an establishment of religion . . . ."

17. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court,* 402 U.S. 689 (1971).

18. Plaintiff-employee, however, also asserted that his religion barred him from asking someone else to work in his place.

19. Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 711 (W.D. Mich. 1969), *rev'd,* 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court,* 402 U.S. 689 (1971); *accord* Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276 (E.D. La. 1969).

20. Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court,* 402 U.S. 689 (1971).

21. *Id.* at 334-35.

22. Because the Supreme Court affirmed by an equally divided Court, the decision is not "entitled to precedential weight." Neil v. Biggers, 409 U.S. 188, 192 (1972).

23. The Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e(j) (Supp. IV 1974) (amending 42 U.S.C. § 2000e (1970)). One Senator remarked:

> This amendment is intended, in good purpose, to resolve by legislation - and in a way I think was originally intended by the Civil Rights Act - that which the courts apparently have not resolved. I think it is needed not only because court decisions

rate the 1967 EEOC guidelines.[24] The amendment primarily sought to add enforcement procedures to Title VII, but also included a provision later known as the Randolph Amendment.[25] The Randolph Amendment defined religion as including all aspects of observance and practice and required that an employer demonstrate that he could not accommodate an employee's religious practices without undue hardship.[26] Unfortunately, the 1972 amendment, like the 1967 guidelines, failed to define "reasonable accommodation" or "undue hardship." Consequently, lower courts still confronted the task of applying reasonable accommodation standards and deciding which accommodations would cause undue hardship to the employer. The resulting case-by-case analysis has provided meaning and scope to the accommodation rule.

B. What is "Religion"?

Title VII's proscription against religious discrimination in employment presupposes the existence of "religion"[27] without really defining it.[28] Although most religious discrimination in employment cases involve organizations clearly recognized as religious in nature, in some instances the EEOC or the courts have had to initially assess whether the alleged discrimination involved a "religion" or a "religious observance or practice," or whether the discrimination stemmed from prejudice of a different kind, such as dislike of the person's political or philosophical views.[29] Much dispute has revolved around the question whether the Civil Rights Act affords pro-

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have clouded the matter with some uncertainty; I think this is an appropriate time for the Senate, and hopefully the Congress of the United States to go back, as it were, to what the Founding Fathers intended. The complexity of our industrial life, the transition of our whole area of employment, of course are matters that were not always understood by those who led our Nation in earlier days.

118 CONG. REC. 705-06 (1972) (remarks of Sen. Randolph).

24. The legislative history of the amendment reveals the following congressional approval of the guidelines pertaining to religious discrimination that EEOC had previously adopted: "The purpose of this subsection (Section 701(j)) is to provide the statutory basis for EEOC to formulate guidelines on discrimination because of religion such as those challenged in *Dewey v. Reynolds Metals Company*. . . ." 118 CONG. REC. 7564 (1972).

25. The amendment derived its name from Senator Randolph, the sponsor of the aspect of the amendment that dealt with religion.

26. 42 U.S.C. § 2000e(j) (Supp. IV 1974).

27. There have been many notable attempts to erect a workable constitutional standard for defining religion. *See, e.g.*, Bowser, *Delimiting Religion in the Constitution: A Classification Problem*, 11 VAL. U. L. REV. 163 (1977); Boyan, *Defining Religion in Operational and Institutional Terms*, 116 U. PA. L. REV. 479 (1968); Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Killilea, *Standards for Expanding Freedom of Conscience*, 34 U. PITT. L. REV. 531 (1973); Rabin, *When Is a Religions Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231 (1966).

28. 42 U.S.C. § 2000e(j) (Supp. IV 1974) does provide that the "term 'religion' includes all aspects of religious observance and practice, as well as belief . . ."

29. Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1026 (E.D. Va. 1973) (plaintiff allegedly discharged because of membership in United Klans of America; court held that racist and anti-semitic ideology of that organization has a "temporal and political character inconsistent with the meaning of 'religion' as used in" the Civil Rights Act).

tection only to beliefs, practices, and observances of orthodox and traditional religious groups, or whether the protection extends to any "religion," however unorthodox, mistaken, or incomprehensible the average person might find it.

The Founding Fathers and, originally, the Supreme Court conceived of religion almost exclusively in terms of traditional religious concepts.[30] While the intentions of those who drafted and adopted the religion clauses remain unclear, certain known historical circumstances surrounding the genesis of the clauses suggest the aims of the framers.[31] Contemporaneous documents indicate that "religion" implied at least theism, and little doubt exists that to the framers' "religion" entailed a relationship of man to some Supreme Being.[32] This concept, while not decisive for current interpretation, certainly influenced the early cases that attempted to define "religion."

For the courts, defining "religion" presents a problem of statutory construction.[33] Generally, the definition of a word in a statute should mirror the understanding of the legislators who enacted the statute.[34] This approach will usually result in a definition of "religion" that includes only traditional religions.[35] Courts have therefore usually construed religion to mean "one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will."[36] Yet early

30. *See, e.g.,* United States v. MacIntosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation."); Davis v. Beason, 133 U.S. 333, 342 (1890) (" '[R]eligion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.").

31. Issues of religion and the relationship between government and religion had played a direct role in several hundred years of armed conflict in Europe. More recent, and certainly in the minds of our early leaders, were Henry VIII's break with Rome and subsequent conflicts with Catholicism, the Anglican-Puritan struggles, and the growing pressure for disestablishment and for toleration for dissenters. *See* Everson v. Board of Educ., 330 U.S. 1, 8-13 (1947).

32. James Madison described religion as "the duty which we owe to our Creator, and the Manner of discharging it." Madison, *A Memorial and Remonstrance on the Religious Rights of Man,* reprinted as an appendix to Justice Rutledge's dissent in Everson v. Board of Educ., 330 U.S. 1, 64 (1947).

33. State statutes exempt religious organizations from property and sales taxes, *e.g.,* ILL. REV. STAT., ch. 120, § 500.2 (1979). Federal law exempts conscientious objectors from the draft, Selective Service Act of 1948, 62 Stat. 612, 50 U.S.C. App. § 456(j) (1981). The Internal Revenue Code exempts the income of religious organizations, I.R.C. §§ 501(a), 591(c)(3) (1976). State statutes often declare that prisoners are entitled to the free exercise of religion, *e.g.,* N.Y. CORRECT. LAW § 610 (McKinney Supp. 1981).

34. *See, e.g.,* People *ex rel.* v. Fyfe v. Barnett, 319 Ill. 403, 150 N.E. 290 (1926). *See also* Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COLUM. L. REV. 527, 536 (1947).

Another view encourages courts to accord statutory language its present meaning. *See, e.g.,* Commonwealth v. Maxwell, 271 Pa. 378, 114 A. 825 (1921).

35. *See* Washington Ethical Soc'y v. District of Columbia, 84 Wash. L. Rptr. 1072, 1082 (D.C.T.C. 1956), *rev'd,* 249 F.2d 127 (D.C. Cir. 1957), *quoted with approval in* Fellowship of Humanity v. County of Alameda, 153 Cal. App. 2d 673, 704, 315 P.2d 394, 413 (1957) (dissent).

36. Davis v. Beason, 133 U.S. 222, 241 (1890). *See also* United States v. Macintosh, 283 U.S. 605, 633-34 (1931) (Hughes, C.J., dissenting) ("The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation.").

cases indicated judicial dissatisfaction with the requirement of belief in a deity, and intimated that, while belief in a Supreme Being was a characteristic common to most religions, it was not necessarily a requirement.[37] Justice Jackson indicated the Court's reluctance to impose orthodoxy of thought in *West Virginia State Board of Education v. Barnette:*[38] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[39] Justice Douglas voiced a similar view a year later in *United States v. Ballard,*[40] stating that freedom of religion "embraces the right to maintain theories . . . which are rank heresy to followers of the orthodox faiths. . . . Men may believe what they cannot prove."[41]

The draft cases involving claims for conscientious objector status[42] illustrate this evolution in the judicial definition of religion.[43] In *United States v. Seeger,*[44] the Supreme Court construed "religion" within the meaning of a conscientious objector statute, which provided: "Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code."[45] The Court held that Seeger merited

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37. Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) (recognizing as religions Buddhism, Taoism, Ethical Culture, and Secular Humanism, though they "do not teach what would generally be considered a belief in the existence of God"); Fellowship of Humanity v. County of Alameda, 153 Cal App. 2d 673, 315 P.2d 394 (1957) (allowing tax exemption since the group's activities closely resembled theistic religious groups except for lack of belief in a Supreme Being).

38. 319 U.S. 624 (1943).

39. *Id.* at 642.

40. 322 U.S. 78 (1944).

41. *Id.* at 86.

42. 50 U.S.C. app. § 456(j) (1976) provides in part:

> Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local [Selective Service] board shall, if he is inducted into the armed forces . . . be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board . . . to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the Director may deem appropriate.

For a discussion of conscientious objector exemptions and alternative duty, see Redlich and Feinberg, *Individual Conscience and the Selective Conscientious Objector: The Right Not to Kill,* 44 N.Y. U.L. REV. 875, 898-99 (1969).

43. *E.g., compare* David v. Beason, 133 U.S. 333, 341-42 (1890) (to call advocacy of polygamy "a tenet of religion is to offend the common sense of mankind") *with* United States v. Ballard, 322 U.S. 78, 86-87 (1944) (unusual religious beliefs are not less worthy of protection).

The Supreme Court's expansive approach parallels an evolving religious toleration developing in the international community. *See generally* McDougall, Lasswell & Chen, *The Right to Religious Freedom and World Public Order: The Emerging Norm of Nondiscrimination,* 74 MICH. L. REV. 865 (1976).

44. 380 U.S. 163 (1965).

45. Selective Service Act of 1948, ch. 625, § 6(j), 62 Stat. 612 (current version at 50 U.S.C.

exemption from military service because his "religious" belief[46] represented a belief in "a relation to a Supreme Being" consistent with congressional intent. The Court held that a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."[47]

Although Congress subsequently amended the statute to eliminate the "Supreme Being" requirement,[48] *Seeger* continued to require an inference that a claimant's belief be "religious." In *Welsh v. United States,*[49] however, the Court broadened its view to include moral or ethical beliefs,[50] requiring that the claimed belief "play the role of a religion and function as a religion in the registrant's life."[51] The Court held that a sincere petitioner might lose the exemption only if his system of beliefs did "not rest at all upon moral, ethical, or religious principle but instead [rests] *solely* upon considerations of policy, pragmatism, or expediency."[52]

Although the Civil Rights Act prohibited religious discrimination, it failed to define "religion,"[53] and the courts never established the meaning of that term under the Civil Rights Act.[54] The EEOC, however, in a 1970 case, adopted the Supreme Court's definition of "religion" in the conscientious objector cases as the definition for use

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app. § 456(j) (1976)). The legislature added "Supreme Being" language after Berman v. United States, 156 F.2d 377 (9th Cir.), *cert. denied,* 329 U.S. 759 (1946), in which the court denied objector status to a socialist who opposed war as morally wrong. For a discussion of nature of the religious belief required for draft exemption see United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943), and United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).

46. Seeger remained unsure of his belief in God, but he did believe in goodness and virtue, and held a religious faith in a purely ethical creed.

47. 380 U.S. at 176. The history of the "Supreme Being" element of the statute's religious test (*see supra* note 46), as well as its clear language, indicate that Congress probably intended to limit conscientious objector status to those who believe in God as that term is commonly understood. The Court's discussion of statutory construction and congressional intent appears to be merely a device to avoid declaring the statutory definition of religion an unconstitutional discrimination against nontheistic religions. *See* 380 U.S. at 188-93 (Douglas, J., concurring).

48. Military Selective Service Act of 1967, Pub. L. No. 90-40, § 1(7), 81 Stat. 104 (current version at 50 U.S.C. app. § 456(j) (1976)).

49. 398 U.S. 333 (1970).

50. *Id.* at 340.

51. *Id.* at 339. In *Welsh* the registrant refused to classify his beliefs as religious yet the Court still found the beliefs emanated from moral and ethical tenets held with the sincerity of traditional religious beliefs. *Id.* at 340.

52. 398 U.S. at 342-43 (emphasis added). The ruling represented the final step in a remarkable judicial translation of legislative language. Section 6(j) excluded from exemption those whose opposition to war rested on "essentially political, sociological or philosophical" grounds. 50 U.S.C. app. § 456(j) (1970). The *Seeger* court, in expanding the concept of religion, narrowed the exclusion to those beliefs of a "political, sociological or economic" nature. 380 U.S. at 173 (emphasis added). Finally, in *Welsh,* the three categories had been reduced to "policy, pragmatism, or expediency." 398 U.S. at 343.

53. *See supra* note 28.

54. *See* Edwards & Kaplan, *supra* note 2, at 614-19.

in employment discrimination cases.[55] Although the EEOC found no evidence in this 1970 case that the employee involved belonged to "an organized sect whose beliefs are common to a number of people,"[56] it determined that her belief fell within the coverage of the Act because she held her conviction "with the strength of traditional religious convictions."[57] The EEOC essentially applied the *Seeger-Welsh* test[58] to ascertain whether the belief merited the Act's protection. Nothing in the legislative history relating to the 1972 amendment to the Act[59] indicates any congressional intention to change the application of the test.[60]

While courts have held that Title VII encompasses atheistic beliefs,[61] its protection does not include all beliefs. Even though the definition of "religion" appears broad, the "religion" protected by the Constitution clearly cannot be subjective or merely a matter of personal preference.[62] The courts have relied on the views of some progressive theologians, notably Paul Tillich.[63] Tillich finds the essence of religion to lie in the phrase "ultimate concern."[64] Not merely a matter of "personal choice deduced from economic or social ideology, [a religious belief] must consider man's nature or the scheme of his existence as it relates in a theological framework, and

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55. EEOC Dec. No. 71-779, *summarized at* 3 Fair Empl. Prac. Cas. (BNA) 172 (Dec. 21, 1970).

56. *Id.* at 173.

57. *Id.*

58. Courts have adopted the *Seeger-Welsh* test in a variety of contexts. *See* Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir.) (truth in labeling requirement held inapplicable; doctrine of Scientology likened to traditional religions because it comprehensively explained man's nature and place in the universe), *cert. denied,* 396 U.S. 963 (1969); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973) (Church of New Song allowed to claim protection of first amendment and thus to hold worship services in prison; doctrine of Church analogized to Hindu faith), *aff'd per curiam,* 494 F.2d 1277 (8th Cir.), *cert. denied,* 419 U.S. 1012 (1974); Fulwood v. Clemmer, 206 F. Supp. 370, 373 (D.D.C. 1962) (Muslims entitled to first amendment privileges in prison because their faith, in its nature and effect on individuals, compared to recognized religious faiths); People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (Indian users of peyote exempt from regulation banning such use because of their belief that peyote use brought them into contact with God).

59. 42 U.S.C. § 2000e(j) (Supp. II, 1972), *amending* 42 U.S.C. § 2000e (1970).

60. 118 CONG. REC. 705-06 (1972) (remarks of Sen. Randolph); *see* Weitkenaut v. Goodyear Tire & Rubber Co., 381 F. Supp. 1284, 1288 (D. Vt. 1974) (citing with approval Sen. Randolph's remarks); *see also* Edwards & Kaplan, *supra* note 2, at 618 n.95 ("That title VII meant to incorporate a broad definition of religion is beyond dispute. This conclusion is supported by the legislative history, which indicates that an amendment to exempt atheists from the protection of Title VII was defeated.").

61. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 141-42 (5th Cir. 1975) (atheist held to be victim of religious discrimination).

62. Wisconsin v. Yoder, 406 U.S. 205, 216 (1972). (Thoreau's beliefs were subjective rejection of social values, a "choice that was philosophical and personal rather than religious . . ."); Edwards v. School Bd. of Norton, 483 F. Supp. 620, 624 (W.D. Va. 1980) (for Title VII purposes, religious belief excludes mere personal preference), *vacated in part and remanded on other grounds,* 658 F.2d 951 (4th Cir. 1981).

63. United States v. Seeger, 380 U.S. 163, 187 (1965).

64. P. TILLICH, DYNAMICS OF FAITH 1-2 (1958).

the belief must be sincerely held . . .".[65] A claim based on "religious" status may be rebutted by showing that the claimant does not hold the asserted belief in good faith, but "erected [the belief] for the sole purpose of cloaking a secular enterprise with the legal protections of religion."[66]

As in any situation in which a certain group acquires preferred status, the possibility exists that some individuals will attempt to take advantage of the preferred position.[67] For example, frequently accommodating an employee's religious beliefs affords that employee some benefits or preferential treatment otherwise not available to him. Theoretically, someone could claim that his religion required him to bowl every Wednesday night, and the employer would have to allow him that time off.[68] On the other hand, numerous small religious groups exist, or may exist in the future, whose members fervently believe in their faiths, however unusual, and these faiths should clearly enjoy protection. Delineating these two extremes and defining what constitutes a bona fide religious belief represents a difficult undertaking because all religions are "based more on faith than on reason, [and are therefore,] by definition, somewhat irrational."[69]

The question of an employee's sincerity often involves inquiring whether the employee in practice adheres to the alleged belief.[70] Some of the most difficult cases in this area focus on an employee's belief that has evolved over a period of time. The courts only require the belief to be religious within the employee's own moral, ethical or religious conception at the time it is claimed, and to be held

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65. Edwards v. School Bd. of Norton, 483 F. Supp. 620, 624 (W.D. Va. 1980), *vacated in part and remanded on other grounds,* 658 F.2d 951 (4th Cir. 1981).

66. Founding Church of Scientology v. United States, 409 F.2d 1146, 1162 (D.C. Cir.), *cert. denied,* 396 U.S. 963 (1969).

67. *Compare* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (peyote use as sacramental symbol by Native American Church over period of several centuries) *with In re* Grady, 61 Cal. 2d 887, 394 P.2d 728, 39 Cal. Rptr. 912 (1964) (small group of recent origin claiming peyote use for religious purposes).

68. To discourage insincerity, religious accommodation claims might, in appropriate cases, be conditioned on the petitioner's agreement to the imposition of some alternative duty or burden. Selective service statutes contain such provisions. *See supra* note 44. The use of alternative burdens would promote three desirable ends: it would discourage insincere claims, minimize the cost of engaging in accommodation, and accord roughly equivalent treatment to exempted and unexempted persons.

69. Edwards & Kaplan, *supra* note 2, at 615.

70. *See, e.g.,* Theriault v. Silber, 391 F. Supp. 578, 582 (W.D. Tex. 1975) (Eclatarian faith not considered religious because the church operated as "masquerade" that encouraged "do-as-you-please philosophy"), *vacated and remanded per curiam,* 547 F.2d 1279 (5th Cir.), *cert. denied,* 434 U.S. 943 (1977); Hansard v. Johns-Manville Prod. Corp., 5 Empl. Prac. Dec. (CCH) 7560 (E.D. Tex. 1973) (employee refused to work on Sunday because of alleged religious reasons even though he had worked on previous Sundays *after* the date of his conversion to a no-Sunday-work religion, and he offered no adequate explanation for this); Dobkin v. District of Columbia, 194 A.2d 657, 659 (D.C. App. 1963) (defendant sought continuance of trial on grounds it would extend into his Sabbath, though defendant often worked in the office on his Sabbath).

with the "strength of more traditional religious convictions."[71] Thus, when an employee merely stated that he reaffirmed his belief in strict Sunday Sabbath observance after his son miraculously recovered from surgery, without elaborating on the basis of that belief, a court held that the plaintiff "failed to demonstrate the requisite sincerity of religious convictions to make out a prima facie case."[72]

The courts have not established any formal requirements relating to membership in a religious organization,[73] duration of adherence to the belief, or consistency in that adherence.[74] Consequently, employers bear an almost insurmountable burden of proof in attempting to impugn an employee's sincerity. Because of such proof problems, the parties often stipulate to the sincerity of religious belief, or do not dispute the employee's sincerity.[75]

Apparently, all groups legitimately labelled religious share one quality: "[T]hey address the ultimate questions of existence and attempt to cope with the unknowable."[76] Religion functions to provide the adherent with answers to the fundamental questions of

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71. Welsh v. United States, 398 U.S. 333, 337 (1970). *See also* Hansard v. Johns-Manville Prod. Corp., 5 Empl. Prac. Dec. (CCH) 7560 (E.D. Tex. 1973).

72. *Id.* at 7562. The employee worked on Sundays for a considerable period after his son's miraculous recovery before the employee requested Sundays off.

73. While courts sometimes suggest that a religious "belief must have an institutional quality about it," Edwards v. School Bd. of Norton, 483 F. Supp. 620, 624 (W.D. Va. 1980), *vacated in part and remanded on other grounds,* 658 F.2d 951 (4th Cir. 1981) this element acts more as a test of sincerity than as a requirement of "religion." *See, e.g.,* Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd per curiam,* 494 F.2d 1277 (8th Cir.), *cert. denied,* 419 U.S. 1012 (1974). Of course, an employee may try to prove his sincerity by introducing other followers as witnesses. *Id.*

74. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707 (1981), in which the Court reversed an Indiana decision denying unemployment benefits to a Jehovah's Witness who quit work when asked to produce tank turrets although he acknowledged that he would not object to producing the raw material for the same tanks. The Court stated:

> The [Indiana] court found this position inconsistent with Thomas' stated opposition to participation in the production of armaments. . . . Thomas drew a line and it is not for use to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs because the believer . . . is "struggling" with his position. . . .
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> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was "scripturally" acceptable. . . . [T]he guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.

Id. at 715-16.

75. *See, e.g.,* Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 142 n.3 (5th Cir. 1975) ("there is no question of the sincerity of Mrs. Young's religious beliefs"); Reid v. Memphis Publ. Co., 468 F.2d 346, 348 (6th Cir. 1972); Riley v. Bendix Corp., 464 F.2d 1113, 1114 (5th Cir. 1972); Kettell v. Johnson & Johnson, 337 F. Supp. 892 (E.D. Ark. 1972); Dawson v. Mizell, 325 F. Supp. 511, 513 (E.D. Va. 1971); Jackson v. Veri Fresh Poultry, Inc., 304 F. Supp. 1276, 1278 (E.D. La. 1969); Dewey v. Reynolds Metals Co., 300 F. Supp. 709, 711 (W.D. Mich. 1969), *rev'd,* 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court,* 402 U.S. 689 (1971).

76. Note, *Defining Religion: Of God, The Constitution and the D.A.R.,* 32 U. OF CHI. L. REV. 533, 550 (1965).

life—the nature of existence and the role of the individual within that existence. For a belief-system to play in the life of an individual a role analogous to that played by conventional faiths, the system must approximate the comprehensiveness of conventional religions regarding the number of relationships to which it is relevant, and in the number of things it explains or the number of questions it answers.[77] Two consequences of this cosmological aspect of religion taken together aid in distinguishing religious from nonreligious belief. First, because religious belief is comprehensive, it may potentially permeate the believer's every action.[78] Second, because the explanations offered by a religious belief defy empirical verification and wholly rational understanding, it must rest on faith.[79]

Legal writers have frequently attempted to systematize the definition of religion,[80] but the courts have largely refused to confine themselves so narrowly. For the foreseeable future the courts seem likely to construe "religion" broadly, and to insist only that the employee hold the "religious belief" sincerely.[81]

C. Burdens on Free Exercise of Religion

Religious discrimination in employment has at least three possible definitions: (1) discrimination by *intent,* which limits violation of religious tenets to wilfull discrimination by an employer, such as the refusal to hire a person merely because of his religious persuasion; (2) discrimination by *effect,* which broadens violation to include the impact of an employment rule if it adversely affects a particular employee in the practice of his religious beliefs regardless of motive, such as a rule requiring all employees to work on Saturday, which rule would negatively impact the religious practices of Sabbatarians;[82] and (3) the *accommodation rule,* which also broadens violation to discrimination by effect, but permits an employer to exonerate himself by proving that he made efforts to reasonably accommodate

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77. *See* Founding Church of Scientology v. United States, 409 F.2d 1146, 1160 (D.C. Cir.) (faith in Scientology religious because it provided a "general account of man and his nature comparable in scope, if not content, to those of some recognized religions"), *cert. denied,* 396 U.S. 963 (1969).

78. "By its nature, religion - in the comprehensive sense in which the Constitution uses that word - is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade . . . virtually all human activity." McGowan v. Maryland, 366 U.S. 420, 461 (1961) (Frankfurter, J., concurring).

79. *See* United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

80. *See, e.g.,* Note, *supra* note 76, at 550-51; Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities,* 90 YALE L.J. 350, 363 (1980).

81. "Religious belief . . . is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets." United States v. Kauten, 133 F.2d 703, 708 (2d Cir. 1943).

82. A Sabbatarian is one who observes the Sabbath on Saturday.

the employee or by showing that accommodation would cause undue hardship to his business.

The core of the free exercise of religion clause is voluntarism—the inviolability of conscience.[83] At a minimum, the clause guarantees freedom of conscience by preventing any degree of compulsion in matters of belief. It prohibits not only direct compulsion but also any indirect coercion that might result from subtle discrimination;[84] hence, any burden based specifically on one's religion offends the free exercise clause.

Problems arise when the law forces an individual to choose between following his religious principles, thereby suffering an economic or other loss, and abandoning his religion or conscience to avoid loss.[85] Legislatures and courts generally recognize that forcing this choice differs entirely from outlawing a religious practice, but still substantially interferes with religious liberty. Hence, they have made "an effort to accommodate the demands of the state to the conscience of the individual."[86] Most of the states which have passed Sunday closing laws, for example, have provided an exemption for those who rest on a different day because of religious conviction.[87] Consistent with the general legislative recognition of the desirability of accommodating religious beliefs,[88] Congress requires employers to make "reasonable accommodations" for the religious practices of their employees.[89]

III. Types of Religious Needs that Seek Accommodation

Courts more readily grant an exemption when fundamental

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83. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee,* 80 HARV. L. REV. 1381, 1386 (1967).

84. *See, e.g.,* Cruz v. Beto, 405 U.S. 319 (1972) (prison must provide Buddhist reasonable opportunity to pursue his faith comparable to that afforded other prisoners); Fowler v. Rhode Island, 345 U.S. 67 (1953) (Jehovah's Witnesses meeting may not be barred from public park open to other religious services).

85. *See* Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting) ("Pennsylvania has passed a [Sunday] law which compels an orthodox Jew to choose between his religious faith and his economic survival"); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

86. Girouard v. United States, 328 U.S. 61, 68 (1946). At times, however, religious liberty must yield to an overriding government interest. *See, e.g.,* United States v. Lee, 50 U.S.L.W. 4201 (U.S. Feb. 23, 1982) (Amish objection to participation in Social Security system must yield to need to preserve viability of an important government program).

87. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (Appendix II to Opinion of Justice Frankfurter at 551 *et seq.*).

88. The contribution that religion makes to the community presents a major justification for granting exemptions. The Court said in United States v. Seeger, 380 U.S. 163, 170 (1965): "All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state." The Court quoted from Stone (later appointed Chief Justice), *The Conscientious Objector,* 21 COL. UNIV. Q. 253, 269 (1919).

89. *See supra* notes 23-26 and accompanying text.

principles of religion or conscience conflict with the law than when the conflict involves a noncentral tenet of the religion.[90] One writer[91] has criticized this approach because of the difficulty in discerning "a fundamental principle," "a central tenet," or "a cornerstone of religion." He argues that sometimes disputes arise even within a given religion regarding the religion's central tenets. Further, because religious practices frequently appear irrational to nonmembers, the courts cannot realistically choose which among many conflicting practices warrant protection. Tests, such as whether a particular belief attracts only a handful of followers or qualifies as unorthodox by contemporary standards, do not suffice when their application precludes legal protection. Indeed, some of the world's largest religions, such as Christianity, Islam, and Buddhism, did not conform to prevailing beliefs at the time of their establishment.

To date, most claims for accommodation have involved an employee's work schedule, his refusal to join a union or pay union dues, or his desire to wear his hair or clothing in a certain manner. This article will discuss these situations first. In view of the great diversity of religious beliefs and practices in this country, however, many other potential claims for accommodation exist. We will then examine these.[92]

Employees seek accommodation most frequently when their work schedules conflict with religious mandates. An employer must attempt to accommodate reasonable requests by employees for absence on their Sabbath or other religious holidays.[93] For example, members of certain religious groups (most notably orthodox Jews and Seventh Day Adventists) regard Saturday as their Sabbath.[94]

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90. In Gillette v. United States, 401 U.S. 437 (1971), the Court's language implicitly reaffirmed the approach of according more protection to fundamental principles: "*fundamental* principles of conscience and religious duty may sometimes override the demands of the secular state." *Id.* at 445 (emphasis added).

For example, in Sherbert v. Verner, 374 U.S. 398 (1963), the Court regarded the observance of the Sabbath as "a cardinal principle" of the faith of Seventh Day Adventists. In People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), the court sustained an exemption from the drug laws, noting that peyote played "a central role in the ceremony and practice of the Native American Church," *id.* at 720, 394 P.2d at 817, 40 Cal. Rptr. at 73, and that the "ceremony marked by the sacremental use of peyote composes the cornerstone of the peyote religion." *Id.* The court also said that '[t]o forbid the use of peyote is to remove the theological heart of Peyotism." *Id.* at 722, 394 P.2d at 818, 40 Cal. Rptr. at 74.

91. M. KONVITZ, RELIGIOUS LIBERTY AND CONSCIENCE 78-79 (1968).

92. *See infra* notes 106-17 and accompanying text.

93. *See, e.g.,* Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd per curiam by an equally divided Court,* 402 U.S. 689 (1971); Willey v. Maben Mfg., 497 F. Supp. 634 (N.D. Miss. 1979); Rankins v. Commission on Professional Competence, 24 Cal. 3d 167, 593 P.2d 852, 154 Cal. Rptr. 907, *appeal dismissed,* 444 U.S. 986 (1979); Hildebrand v. California Unemployment Ins. Appeals Bd., 19 Cal. 3d 765, 566 P.2d 1297, 140 Cal. Rptr. 151 (1977), *cert. denied,* 434 U.S. 1068 (1978); California Teachers Ass'n v. Board of Trustees, 70 Cal. App. 3d 431, — P.2d —, 138 Cal. Rptr. 817 (1977).

94. More than one million non-Sunday Sabbatarians exist in the United States today, including an estimated 750,000 orthodox Jews, 425,000 Seventh Day Adventists, and 5,000

Their religious beliefs forbid them to work on the Sabbath, the day of rest.[95] Certain employers, however, require that their employees work on Saturday to obtain or retain their jobs,[96] thus forcing an employee to choose between work and religion. An employee faces the same problem if his schedule requires him to work when his church has assigned him to teach a Bible study class[97] or when he must attend a mandatory religious assembly.[98] A similar conflict arises when a company requires employees to take their vacations during a two-week plant shutdown, does not permit leaves of absence exceeding two days, and an employee's church requires its members to attend the church's annual national convention.[99]

A second major situation in which employees seek accommodation occurs when employees object to joining or supporting a labor union.[100] The objection hinges upon their religious belief that supporting union picketing and strikes violates the Biblical command to love one's neighbor.[101]

A third area requiring accommodation involves employees' personal appearances. Typical cases occur when an employee has grown a beard[102] or worn certain apparel[103] that an employer feels

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Seventh Day Baptists. 118 CONG. REC. 705 (1972) (remarks of Senator Randolph). Other faiths, such as Islam, also celebrate the Sabbath on a day other than Sunday. *See* Rodman v. Robinson, 134 N.C. 503, 510, 47 So. 19, 21 (1904).

95. The basis for this belief is a literal interpretation of the Fourth Commandment in the Bible which states: "Six days shalt thou labor and do all thy work: but the seventh day is a sabbath unto the Lord thy God; in it thou shalt not do any manner of work. . . ." *Exodus* 20:9, 10; *Deuteronomy* 5:13, 14 (King James).

96. Saturday and Sunday work may become increasingly common, as employers choose or are required to spread out energy use, avoid traffic congestion, and permit more extensive use of recreational facilities.

97. Redmond v. GAP Corp., 574 F.2d 897, 900 (7th Cir. 1978).

98. *See, e.g.,* School Dist. No. 11 v. Umberfield, 32 Colo. App. 306, 512 P.2d 1166 (1973), *modified and aff'd,* 522 P.2d 730 (Colo. 1974).

99. EMPL. PRAC. GUIDE (CCH) ¶ 6206 (1973) (EEOC Dec. No. 71-463 (1970)). *See also* Niederhuber v. Camden County Vocational Technical School Dist. Bd. of Educ., 495 F. Supp. 273 (D.N.J. 1980) (teacher required to miss from five to ten work days per year to observe holy days of Worldwide Church of God).

100. Yott v. North Am. Rockwell Corp., 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 444 U.S. 928 (1980); Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), *cert. denied,* 439 U.S. 1072 (1979); Anderson v. General Dynamics, 648 F.2d 1247 (9th Cir. 1981), *rev'g,* 489 F. Supp. 782 (S.D. Cal. 1980); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978); Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); Tooley v. Martin-Marietta Corp., 476 F. Supp. 1027 (D. Ore. 1979), *aff'd* 648 F.2d 1239 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 671 (1982).

101. *Mark* 12:31 (King James).

102. EEOC v. Sambo's of Ga., Inc., 27 Fair Empl. Prac. Cas (BNA) 1210 (N.D. Ga. 1981) (Sikh refused to shave his facial hair); Eastern Greyhound Lines v. New York Div. of Human Rights, 34 A.D.2d 916, 311 N.Y.S.2d 465, *aff'd,* 27 N.Y.2d 279, 265 N.E.2d 745, 317 N.Y.S.2d 322 (1970). Other cases might involve hair length, *e.g.,* Longo v. Carlisle De Coppet & Co., 537 F.2d 685 (2d Cir. 1976) (employer required short hair on men); Teterud v. Gillman, 522 F.2d 357 (8th Cir. 1975) (Plains Indian wore long hair), or hair style (a Hari Krishna's queue).

103. EEOC v. Rollins, 8 Fair Empl. Prac. Cas. (BNA) 492 (N.D. Ga. 1974) (Black Muslim wore "certain religious clothing"); 4 Fair Empl. Prac. Cas. (BNA) 23 (June 1971) (Black Mus-

may adversely affect his business.[104]

In numerous situations, an employee may seek exemption from performing a certain job assignment,[105] from participating in a certain program,[106] from undergoing medical tests or treatment,[107] or from meeting other requirements of employment.[108] In other cases, the employee may ask the employer to provide something needed for religious observance or practice, especially if the employee's assignment entails working in a remote area without normal facilities and materials. Accommodation might require providing a place of worship, and perhaps even a chaplain;[109] a special diet[110] or cooking utensils;[111] or such items as candles and incense.[112] Finally, employees may assert a variety of other needs for religious accommodation,[113] such as refusing to sit on a promotion review board,[114] proselytizing fellow employees,[115] refusing to work with members of

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lim wore ankle length dress); 3 Fair Empl. Prac. Cas. (BNA) 172 (Dec. 1970) (nurse of Old Catholic faith wore close-fitting scarf instead of nurse's cap).

Other cases might involve a Sikh wearing a turban, Sherwood v. Brown, 619 F.2d 47 (9th Cir. 1980), or an orthodox Jew refusing to remove his hat, Close-it Enterprises v. Weinberger, 64 A.D.2d 686, 407 N.Y.S.2d 587 (1978).

104. Although sometimes justified for safety reasons, the employer's feelings often manifest his own bias rather than reflect legitimate concern for the welfare of his business.

105. *See, e.g.,* Thomas v. Review Bd., 450 U.S. 707 (1981) (Jehovah's Witness assigned to work on armament production); Gavin v. Peoples Nat. Gas Co., 613 F.2d 482 (3d Cir. 1980) (Jehovah's Witness required to raise American flag); Chapman v. Pickett, 491 F. Supp. 967 (C.D. Ill.), *rev'd. and remanded mem.*, 645 F.2d 73 (7th Cir. 1980) (Black Muslim required to handle pork in cleaning kitchen); Haring v. Blumenthal, 471 F. Supp. 1172 (D.D.C. 1979) (Roman Catholic Internal Revenue Service employee required to rule on tax-exempt status of organizations which promote abortion and homosexuality); Kenny v. Ambulatory Centre of Miami, 400 So. 2d 1262 (Fla. App. 1981) (nurse required to assist in abortions).

106. *E.g.,* a training program including Darwin's theory of evolution, or other subjects which invoke religious objections. *See also, e.g.,* Palmer v. Board of Educ., 603 F.2d 1271 (7th Cir. 1979), *cert. denied,* 444 U.S. 1026 (1980) (Jehovah's Witness required to teach a "patriotic" curriculum including the pledge of allegiance).

107. *See, e.g.,* Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination); Lewis v. Califano, 616 F.2d 73 (3d Cir. 1980) (claim for disability benefits after refusal to have surgery to remove tumor); Kolbeck v. Kramer, 202 A.2d 889 (N.J. Super. 1964) *modified on other grounds,* 214 A.2d 408 (1965) (medical tests); State *ex rel.* Holcomb v. Armstrong, 39 Wash. 2d 860, 239 P.2d 545 (1952) (x-ray examination); Peterson v. Widule, 157 Wis. 641, 147 N.W. 966 (1914) (examination for venereal disease).

108. *E.g.,* a picture on an I.D. card. *See* Johnson v. Motor Vehicle Div., 197 Colo. 455, 593 P.2d 1363, *cert. denied,* 444 U.S. 885 (1979) (taking photograph prohibited because photograph is "graven image").

109. Abington School Dist. v. Schempp, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring). *See also* Katz, *Freedom of Religion and State Neutrality,* 20 U. OF CHI. L. REV. 426, 429-33 (1953).

110. Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975) (provide kosher food for orthodox Jew).

111. Schlesinger v. Carlson, 489 F. Supp. 612 (M.D. Pa. 1980) (provide hot plate and special room for preparation of Passover meal).

112. Childs v. Duckworth, 509 F. Supp. 1254 (N.D. Inc. 1981).

113. Many such requests have arisen outside of employment, such as schools, prisons, and license applications, and it seems likely that such claims will eventually be made in the employment area.

114. *In re* Jenison, 125 N.W.2d 588 (Minn. 1963) (Bible teachers: "Judge not, that ye be not judged.").

115. Sutin, *The Experience of State Fair Employment Commissions: A Comparative Study,* 18 VAND. L. REV. 965, 996 (1965).

a certain race,[116] or wearing a religious symbol.[117]

While an employer may have an affirmative duty to accommodate the employee's religious needs, the employee must also undertake certain responsibilities. First, the employee must hold a sincere religious conviction and demonstrate that his practices reflect that conviction.[118] Second, the employee must acquaint his employer with the employee's religious needs, as well as the potential impact of his religion on his job performance.[119] This allows the employer to accommodate the employee's needs.[120] Third, the employee must perform his work adequately to avoid justifiable discharge for incompetence. Additionally, an employee's responsibility includes maintaining a flexible attitude.[121] For example, in *United States v. City of Albuquerque*[122] a fireman whose religion prevented him from working on his Sabbath refused to meet with officials who offered to arrange alternative employment with the city. The court therefore determined that the employer had reasonably accommodated the employee and consequently denied the employee's claim of religious discrimination. This case suggests that an obdurate employee cannot expect relief from the judicial system. By contrast, in *Young v. Southwestern Savings and Loan Association,*[123] the court approved an atheist bank teller's failure to negotiate with her employer after the employer required her to attend "sermonettes" before mandatory

116. Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1063 (1978) (private school's racial discrimination on religious grounds).

117. *E.g.,* a crucifix, Star of David, or "I Found It" button.

118. 42 U.S.C. § 2000e (1970), *as amended,* 42 U.S.C. § 2000e(j) (Supp. IV, 1974). The EEOC has decided that the belief need only be held with the strength of traditional religious convictions; it need not represent a belief of an organized religion. In cases of unknown, nonorthodox, or unpopular sects, however, the courts tend to stress the possibility of fraudulent claims. Leary v. United States, 383 F.2d 851 (5th Cir. 1967) (use of marijuana). Therefore, organized religions may encounter less trouble in obtaining exemptions than unorganized religions. Because fraudulent claims are more likely to occur with unknown religions, stressing the greater possibility of fraudulent claims is reasonable. *Compare* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) *with* Leary v. United States, 383 F.2d 851 (5th Cir. 1967). The true question, however, consists of whether the public interest in preventing fraudulent claims outweighs the damage to religious liberty that results from this emphasis on fraudulent claims in cases of unpopular religions. The answer to this question requires a difficult value judgment.

119. Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied,* 434 U.S. 1039 (1978); Willey v. Maben Mfg., 479 F. Supp. 634 (N.D. Miss. 1979).

120. EEOC Dec. No. 72-1579 (1972), 1973 E.E.O.C. COMPL. MAN. (CCH) ¶ 6363. The Commission held that the employee's failure to give the employer advance notice of his inability to work on Saturdays relieved the employer of the duty to accommodate because the employer maintained no available pool of qualified substitutes.

121. In numerous cases decided against the employer, the courts noted that the employee had remained willing to accommodate and in fact had suggested reasonable accommodations that the discriminating employer could have adopted. *See* Drum v. Ware, 7 Fair Empl. Prac. Cas. (BNA) 269 (W.D.N.C. 1974); Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973); Daniels v. Pacific Northwest Bell Tel. Co., 7 Fair Empl. Prac. Cas. (BNA) 1323 (D. Ore. 1972).

122. 423 F. Supp. 591 (D.N.M. 1975), 545 F.2d 110 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977).

123. 509 F.2d 140 (5th Cir. 1975).

staff meetings and "close her ears." The court found no inflexible behavior on the part of the employee, thus suggesting that both employee and employer must remain flexible and that, when an employer refuses compromise, an employee can justifiably discontinue further negotiations.

IV. The Employer's Perspective

A. Scope of the Employer's Duty to Accommodate

The employer must accommodate only insofar as he does not suffer undue hardship. Most courts require the employer to demonstrate attempted accommodation before he can claim undue hardship as a defense.[124] If a qualified prospective employee objects to an employment practice on religious grounds, the employer must try to accommodate the employee prior to hiring him.[125] If a present employee objects to a business practice, the employer should not force him to choose between his religion and his job.[126] Nor should an employer make work so intolerable that an employee will resign, thereby relieving the employer of his duty.[127]

Granting an exemption from a work rule or requirement, or providing the needed facilities or materials, will accommodate most religious needs of employees.[128] When the employee's claim for accommodation involves the work schedule,[129] however, an employer may choose from a variety of available methods[130] including: allow the employee to work a shorter week,[131] or longer hours on the days he works;[132] allow the employee to use vacation time for days he must miss work;[133] allow the employee an unpaid leave of absence;[134] allow the employee to substitute another employee,[135] or

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124. *See* Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978); Shaffield v. Northrop Worldwide Aircraft Serv. Inc., 373 F. Supp. 937, 944 (M. D. Ala. 1974); Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1, 5 (D. Ore. 1973). *But see* Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520 (6th Cir. 1975) (in which court observed employer could prove undue hardship without actually undertaking any accommodations).

125. Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *aff'd by an equally divided Court,* 429 U.S. 65 (1976), *rev'd on rehearing,* 433 U.S. 903 (1977).

126. Young v. Southwestern Sav. & Loan Ass'n, 509 F.2d 140, 144-45 (5th Cir. 1975).

127. *Id.*

128. *See supra* text accompanying notes 100-116.

129. *See supra* text accompanying notes 92-99.

130. The difficulty of arriving at a clear definition of reasonable accommodation has led one court to comment: "In a sense the case boils down to a determination as to whether [the employer] acted reasonably under all the circumstances." Williams v. Southern Union Gas Co., 529 F.2d 483 (10th Cir. 1976).

131. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 39 (8th Cir. 1975), *rev'd,* 432 U.S. 63 (1977).

132. EEOC Dec. No. 70-716 (1970); EEOC Dec. No. 6150 (1973).

133. United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), 545 F.2d 110 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977).

134. Chrysler Corp. v. Mann, 561 F.2d 1282 (8th Cir. 1977), *cert. denied,* 434 U.S. 1039 (1978); Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 275 (W.D. Pa. 1975), *vacated and remanded,* 560 F.2d 579 (3d Cir. 1977).

swap shifts;[136] transfer the employee to another job or shift;[137] allow the employee to pay the cost of overtime for a substitute employee,[138] or work overtime at regular pay himself to compensate for the cost; or allow the employee to work on a flexible schedule if his work so allows.

B. Undue Hardship

Determination of a "reasonable accommodation" involves a balancing between ease of accommodation and undue hardship.[139] Most methods for accommodating an employee's need for religious time off[140] tend to impose some hardship either on the employer or on other employees. The courts, however, have sharply split in determining how severe a hardship can be imposed, and upon whom.[141] The key areas of disagreement have involved allegations of undue hardship in connection with accommodations that would conflict with a collective bargaining agreement,[142] affect the morale[143] or health and safety[144] of the other employees, or would in-

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135. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520-21 (6th Cir. 1975). If the employee's job requires highly specialized or unique skill, substitution may not be possible. Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied,* 433 U.S. 915 (1976); Roberts v. Hermitage Cotton Mills, 8 Fair Empl. Prac. Cas. (BNA) 315 (D.S.C. 1973), *aff'd without published opinion,* 498 F.2d 1397 (1974). If the job requires little or no special skill, or if the work force available to the employer produces other employees who could easily substitute for the Sabbatarian worker, courts have found a violation of Title VII. Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973); Dixon v. Omaha Public Power Dist., 385 F. Supp. 1382 (D. Neb. 1974). Even in situations in which the employee occupies a highly specialized position, the existence of a sufficient number of employees equally capable of substituting for the discharged person may prohibit discharge in connection with one's religious beliefs. And if there is no available substitute, the employer may be required to train one. EEOC Dec. No. 71-463 (1970) (CCH) EEOC Dec. 6206 (1973).

136. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520-21 (6th Cir. 1975); EEOC Dec. No. 72-2066, *summarized at* 4 Fair Empl. Prac. Cas. (BNA) 1063 (1972).

137. Drum v. Ware, 7 Fair Empl. Prac. Cas. (BNA) 269 (W.D.N.C. 1974) (reasonable accommodation achieved when the religious observer was shifted to another post office located 25 miles from where he had been working); Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973) (reasonable accommodation can be made by finding an "open position" for the religious observer).

138. Ward v. Allegheny Ludlum Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975), *vacated and remanded,* 560 F.2d 579 (3d Cir. 1977).

139. Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1, 6 (D. Or. 1973).

140. *See supra* notes 127-37 and accompanying text.

141. *See* Covino, *Religious Discrimination in Employment: Striking the Delicate Balance,* 80 DICK. L. REV. 717, 723-25 (1976); Gorden, *Up Against the Accommodation Rule,* 45 U.MO.K.C. L. REV. 56, 62 (1976).

142. *Compare* Dewey v. Reynolds Metals Co., 429 F.2d 324, 330 (6th Cir. 1970) (a variance of a union contract to allow accommodation of one employee at the expense of others would "constitute unequal administration of the collective bargaining agreement among the employees"), *aff'd by an equally divided Court,* 402 U.S. 689 (1971), *and* Dawson v. Mizell, 325 F. Supp. 511 (E.D. Va. 1971) *with* Hardison v. TWA, 527 F.2d 33, 41 (8th Cir. 1975) ("It would seem that a collective bargaining agreement, the seniority provisions of which preclude any reasonable accommodation for religious observances by employees, is prima facie evidence of union and employer culpability under the Act."), *rev'd,* 432 U.S. 63 (1977).

143. *Compare Draper v. United States Pipe & Foundry Co.,* 527 F.2d 515, 520 (6th Cir. 1975) ("The objections and complaints of fellow employees . . . do not constitute undue hardship in the conduct of the employer's business.") *and* Cummins v. Parker Seal Co., 516 F.2d

volve additional expense to the employer.[145]

Most lower courts have found intangible losses to the employer insufficient to sustain the burden of establishing undue hardship. For example, an accommodation described as disruptive, bothersome, or inconvenient did not constitute undue hardship.[146] Further, complaints from fellow employees as to schedule adjustments, substitution, and shift exchanges seldom establish undue hardship unless employee discontent causes "chaotic personnel problems."[147]

The feasibility of interchanging manpower and facilities plays an important role in determining undue hardship. In large corporations enjoying plentiful resources and manpower, reassigning employees or incurring additional expenses to accommodate does not establish undue hardship.[148] On the other hand, smaller corporations that have less flexibility in terms of spending and rescheduling suffer undue hardship if they must modify their system of operations to accommodate employees' religious beliefs.[149]

An employer may prove undue hardship, however, by demonstrating that business necessity mandates the particular employment practice that infringes upon an employee's religious belief. In *Claybaugh v. Pacific Northwest Bell Telephone Company,*[150] the court perceived the necessity of balancing the employee's right to reason-

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544 (6th Cir. 1975), *aff'd by an equally divided Court,* 429 U.S. 65 (1976), *rev'd on rehearing,* 433 U.S. 903 (1977), *with* Reid v. Memphis Publishing Co., 521 F.2d 512, 522 (6th Cir. 1975) ("Lower morale would result from resentment of the copyreaders with more seniority who preferred to be off Saturday for nonreligious reasons if the management sought to accommodate the plaintiff's religious practices."), *cert. denied,* 433 U.S. 915 (1976).

144. The courts generally agreed that "safety considerations [were] highly relevant in determining whether a proposed accommodation would produce an undue hardship on the employer's business." Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir. 1975). They disagreed, however, on how strictly this standard should be applied. *See* Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974).

145. *Compare* Reid v. Memphis Publishing Co., 521 F.2d 512, 527 (6th Cir. 1975) (while overtime costs do not constitute undue hardship per se, the amount of overtime that the employer would have had to pay in that case did create an undue hardship), *cert. denied,* 433 U.S. 915 (1976), *with* Hardison v. TWA, 527 F.2d 33, 40 (8th Cir. 1975) (overtime costs alone do not constitute an undue hardship), *rev'd,* 432 U.S. 63 (1977).

146. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination,* 71 MICH. L. REV. 59, 82 (1972).

147. "If employees are disgruntled because an employer accommodates its work rules to the religious needs of one employee . . . such grumbling must yield to the single employee's right to practice his religion." Cummins v. Parker Seal Co., 516 F.2d 544, 550 (6th Cir. 1975), *aff'd by an equally divided Court,* 429 U.S. 65 (1976), *rev'd on rehearing,* 433 U.S. 903 (1977). No employer has successfully met the "chaotic personnel problems" standard.

148. Claybaugh v. Pacific Northwest Bell Tel. Co., 355 F. Supp. 1, 5-6 (D. Ore. 1973).

149. Johnson v. United States Postal Serv., 497 F.2d 128 (5th Cir. 1974). In this case, Johnson, a part-time employee who, for religious reasons, refused to work on Saturdays and was consequently discharged, sued a small post office branch that employed only five clerks—two full-time, two part-time and one temporary. The court upheld Johnson's discharge, reasoning that the employer employed so few people that it would suffer undue hardship if required to employ an inflexible part-time employee. (Title VII also prohibits discrimination in federal government employment, including the United States Postal Service. 42 U.S.C. § 2000c-17 (Supp. V. 1975)).

150. 355 F. Supp. 1 (D. Ore. 1973).

able accommodation of his religious needs against the employer's right to avoid undue hardship:

> The requirement upon an employer to make a reasonable accommodation to the religious needs of an employee is not unbending. However, an employer cannot sustain its burden of showing undue hardship without first showing that it made an accommodation as an attempted remedy. As the degree of business hardship increases, the quantity of conduct which will satisfy the reasonable accommodation requirement decreases. The balancing of reasonableness and hardship is what I believe Chief Justice Burger [in *Griggs*] was referring to as the "business necessity" which would qualify as a legitimate reason for discharging an employee.[151]

The need to preserve public safety also plays a persuasive role in establishing undue hardship. In *Dixon v. Omaha Public Power District,*[152] the difficulty of obtaining a substitute for a highly trained lineman to correct high-voltage power line malfunctions constituted undue hardship because substituting an untrained employee could endanger the lives of workers and threaten vital power supplies. Similarly, the absence of a fireman from a fire department with strict staff limitations constituted undue hardship because the absence increased the risk of harm to the lives and property of citizens and firemen.[153]

The necessity of having the work of other employees supervised may also make it impossible for the employer to accommodate a supervisory employee's religious needs.[154] Substitution or schedule adjustments may be impracticable if the employee possesses unusual or unique talents. In a school system, for example, a substitute teacher may be unable to maintain the quality and continuity of education established by the regular teacher.[155] Similarly, the absence of a highly trained engineer to oversee plant operations and equipment failures on a round-the-clock basis may cause costly and disruptive shutdowns that may constitute undue hardship.[156]

The courts have often stated that employers occasionally must bear some costs to accommodate their employees' religious needs. In

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151. *Id.* at 6.

152. 385 F. Supp. 1382 (D. Neb. 1974).

153. United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), *aff'd,* 545 F.2d 110 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977).

154. Fischer v. Alsing, 7 Fair Empl. Prac. Cas. (BNA) 220, 222 (D. Ore. 1974).

155. In School Dist. No. 11 v. Umberfield, 32 Colo. App. 306, 512 P.2d 1166 (1973), *modified and aff'd,* 522 P.2d 730 (Colo. 1974), the employer dismissed a teacher following the teacher's six-day absence from work. The teacher had attended a mandatory religious assembly. In reversing a holding of discrimination by the state civil rights commission, the court agreed with the findings of a hearing officer that although lesson plans were prepared in advance, students "will not progress as well under a substitute teacher."

156. EEOC Dec. No. 4261 (May 7, 1970). The Commission found that because the engineer was "unique in his knowledge" and because his unavailability could result in plant shutdowns costing as much as $25,000 per day, an accommodation would necessarily entail undue hardship.

Dixon v. Omaha Public Power District,[157] however, the court found that requiring an employer to pay significant additional overtime to those employees required to substitute for the accommodated employee imposed undue hardship. More recently, the Sixth Circuit, in *Reid v. Memphis Publishing Company,*[158] held that while overtime costs do not constitute undue hardship per se, the excessive amount of overtime that the employer would have had to pay in that case did create undue hardship. Courts also consider whether the employer can still utilize the involved employees to their fullest capacities despite the substitutions.[159]

Administrative inconvenience rarely suffices to constitute undue hardship. An employer does not prove undue hardship by showing that a particular method of accommodation presents administrative difficulty or disrupts routines.[160] Administrative inconvenience will constitute undue hardship only in situations involving unusually complicated rotating shifts or emergency services that render the juggling of schedules impracticable.[161]

The majority of cases that address the issue of "undue hardship" have involved requests for time off for religious reasons. The issue can arise, however, in cases involving any religious accommodation.[162] In a recent case,[163] for example, the court held that a restaurant would suffer undue hardship if it were required to employ as its manager a Sikh who refused to shave his facial hair. The court anticipated that the restaurant's patrons' reaction would be that beards promote unsanitary conditions. The court found that undue hardship would result from the anticipated reaction of the restaurant's patrons that beards are unsanitary or are conducive to unsanitary conditions, and the fact that the "clean cut" image of the restaurant and its personnel would be diminished.

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157. 385 F. Supp. 1382 (D. Neb. 1974).

158. 521 F.2d 512 (6th Cir. 1975) (replacement would cost employer $77 per week extra in salary), *cert. denied,* 433 U.S. 915 (1976); *see also* Wren v. T.I.M.E.-D.C., Inc., 595 F.2d 441 (8th Cir. 1979) (cost of replacement drivers, and costs because of delays and cancellation of trucking runs when replacement drivers not available, constituted undue hardship).

159. Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Ward v. Alleghany Ludlum Steel Corp., 397 F. Supp. 375 (W.D. Pa. 1975), *vacated and remanded,* 560 F.2d 579 (3d Cir. 1977).

160. *Id. See also* Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided Court,* 429 U.S. 65 (1976), *rev'd on rehearing,* 433 U.S. 903 (1977).

161. United States v. City of Albuquerque, 423 F. Supp. 591 (D.N.M. 1975), *aff'd,* 545 F.2d 110 (10th Cir. 1976), *cert. denied,* 433 U.S. 909 (1977); Dixon v. Omaha Pub. Power Dist., 385 F. Supp. 1382 (D. Neb. 1974). *See also* United States v. Jacksonville Terminal Co., 451 F.2d 418, 451 (5th Cir. 1971) (management convenience and business necessity not synonymous), *cert. denied,* 406 U.S. 906 (1972). *But see* Reid v. Memphis Publishing Co., 521 F.2d 512 (6th Cir. 1975), *cert. denied,* 433 U.S. 915 (1976).

162. *See supra* notes 103-117 and accompanying text.

163. EEOC v. Sambo's of Georgia, Inc., Civ. No. C80-11648 (N.D. Ga. Dec. 30, 1981).

C. *Effect of Union Contracts*

A delicate balance must be maintained between an individual's religious freedom and conflicting interests of others in a secular society such as ours.[164] Thus, any consideration of the effects of implementing Title VII policies must recognize society's compelling interest of promoting and sustaining collective bargaining by labor unions. The National Labor Relations Act "seek[s] to promote industrial peace . . . by fostering a system of employee organization and collective bargaining."[165] Significantly, when interpreting the Act, the Supreme Court has repeatedly emphasized the necessity of subordinating the interests of an individual to the collective interests of all employees in a particular bargaining unit.[166] Specifically, when individual religious rights conflict with the interests of the rank and file, the Court has held that in situations in which a collective bargaining agreement establishing or maintaining a union shop exists,[167] the constitutionally protected right to free exercise of religion must yield to the governmental interest in protecting collective bargaining.[168]

Initially, the EEOC agreed that federal law did not prohibit discharging an employee for refusing to pay union dues even though the employee's sincerely held religious beliefs motivated his conduct.[169] In a 1974 decision, however, the EEOC reversed its position,[170] clarifying the change in a 1975 report:

> *A contract between an employer and a union will not serve as a defense by the union to charges of unlawful discrimination.* This is true whether the contract specifically provides for an unlawful practice or omits any procedure for processing grievances against an unlawful practice. *If an employer . . . is required under law . . . to revise its union contract in order to comply with the law . . . then*

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164. *See* Edwards & Kaplan, *supra* note 2, at 628.

165. Vaca v. Sipes, 386 U.S. 171, 182 (1967).

166. For example, in Vaca v. Sipes, *id.*, the Court upheld a union's right to settle an employee's grievance against management in a manner adverse to his interest. The Court found that allowing an employee to compel arbitration of his grievance regardless of its merits would substantially undermine the collective bargaining agreement. *Id.* at 191. *See also* Humphrey v. Moore, 375 U.S. 335 (1964) (in absence of unfair representation, union can deprive individual of seniority rights when seniority lists of two companies become integrated); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953) (collective bargaining agreement allowing employer to credit employees for preemployment as well as postemployment military service in determining seniority held valid against objection of employees without military experience).

167. Section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1970), provides that no federal statute shall preclude an employer from making an agreement with a labor organization to require membership in a union as a condition of employment.

168. Railway Employees Dep't. v. Hanson, 351 U.S. 225 (1956). *See also* Hammon v. United Papermakers, 462 F.2d 174 (6th Cir. 1972) (discharge of employee refusing to join union or pay dues because of religious beliefs not violative of first amendment rights).

169. *See* 1 EMPL. PRAC. GUIDE (CCH) ¶ 237 (1976).

170. EEOC Dec. No. 74-107 (Apr. 2, 1974), 2 EMPL. PRAC. GUIDE (CCH) ¶ 6430 (1974).

the union involved is expected to cooperate in the revision.[171]

Thus, the EEOC clearly does not recognize union-employer contractual agreements as valid defenses to a charge of religious discrimination brought under Title VII.

Union contracts and collective bargaining agreements have nevertheless provided the basis for undue hardship claims in the lower courts. The employer commonly asserts that he cannot accommodate the employee because the agreements prohibit the accommodation. The majority of lower courts have not recognized reliance on the contract as a defense to failure in attempting to accommodate the employee's religious needs.[172] One court stated that "even if the company were so bound [by the bargaining agreement] it may well be that the company's burden includes seeking union consent to some form of variance."[173] Further, the Supreme Court, in *Alexander v. Gardner-Denver Company,*[174] stated that the principle of nondiscrimination embodied in Title VII merited highest priority in national labor policy.

When seniority clauses exist in the contracts,[175] however, the results may differ. Section 703(h) of Title VII[176] indicates that an employer need not take action that impinges on a bona fide seniority system. Thus, an accommodation that required an employer to bypass a seniority system has established a defense of undue hardship.[177]

A collective bargaining agreement commonly includes a union security provision that usually conditions employment on either membership in the union or the payment of dues to the union by those who choose not to be active members.[178] Some employees,

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171. 81 LAB. L. REP. (CCH) ¶¶ 215.2, 335 (1975), GUIDEBOOK TO FAIR EMPLOYMENT PRACTICES (1975) (emphasis added).

172. *See, e.g.,* Claybaugh v. Pac. Northwest Bell Tel. Co., 355 F. Supp. 1 (D. Ore. 1973). *But see* Drum v. Ware, 7 Fair Empl. Prac. Cas. 269 (W.D.N.C. 1974). (This case impliedly ranked a union contract paramount to the employer's duty to accommodate.)

173. Shaffield v. Northrop Worldwide Aircraft Serv., Inc., 373 F. Supp. 937, 942 (M.D. Ala. 1974).

174. 415 U.S. 36, 51 (1974).

175. Frequently collective bargaining agreements provide for work allocations based on a uniformly applied seniority system that establishes objective criteria for determining layoffs, promotion, shifts, and certain advantages. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 HARV. L. REV. 1598, 1601 (1969).

176. 42 U.S.C. § 2000e-2(h) (1970) provides in part: "[I]t shall not be an unlawful employment practice for an employer to apply different terms, conditions or privileges of employment pursuant to a bona fide seniority system . . . ."

177. Huston v. Local 93, UAW, 559 F.2d 477 (8th Cir. 1977).

178. Yott v. North Am. Rockwell Corp., 428 F. Supp. 763, 764 (C.D. Cal. 1977), 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 444 U.S. 928 (1980). The Supreme Court has approved the use of union security clauses as a proper exercise of congressional power under the commerce clause. Union security clauses provide a means of assuring stable labor relations on the job site. The compulsory provisions discourage "free riders" so that all who receive the benefits of the collective bargaining agreement pay their fair share. *See* Railway Employees Dep't. v.

however, object on religious grounds to the requirement of financially supporting the union.[179]

While individuals should not retain the benefits secured for them by the union without paying dues, it seems harsh to discharge employees if their refusal is based upon sincere religious beliefs. In addition, courts cannot realistically believe that the refusal of a few individuals in a union shop to pay dues will significantly affect the union's treasury or impair its ability to bargain collectively. Perhaps the most equitable alternative in these situations would involve the union and employer granting limited exemptions from union membership in return for the employee's contributing to the union a sum equivalent to union dues with the stipulation that the union donate the sum to charity.[180] The union would consequently obtain control over a portion of the employee's money while assuring the employee that he would not lose his job because of his religious beliefs. Because employees would not get a "free ride," they would not be tempted to use claimed religious objections to avoid payment of union dues and fees.[181]

Hanson, 351 U.S. 225 (1956). *See generally* MORRIS, THE DEVELOPING LABOR LAW 697-725 (1970).

179. Cooper v. General Dynamics Convair Aerospace Div., 378 F. Supp. 1258, 1260 (N.D. Tex. 1974), *rev'd,* 533 F.2d 163 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977). Seventh Day Adventists, for example, while sympathizing with the basic goals of organized labor, such as proper wages, hours, and working conditions, place great value upon personal liberty of conscience. They believe that no person can enjoy or exercise freedom of conscience when bound to membership in any labor union involving people of various convictions associated together and mutually required to adhere to policies, comply with decisions, and abide by restrictions that may conflict with individual conscience. Obviously, occasions arise when, failing to obtain these objectives through the peaceful processes of negotiation, mediation, and arbitration, unions employ measures of coercion, which take the form of boycotts, strikes, picketing, and similar methods of enforcing their demands. Guided by the scriptural injunction as Christians that "the servant of the Lord must not strive," and that he should "do violence to no man," Seventh Day Adventists believe sincerely that they must stand apart from a relationship that requires participation in such procedures. Gray v. Gulf, Mobile & Ohio R.R., 429 F.2d 1064, 1066 n.4 (5th Cir. 1970), *cert. denied,* 400 U.S. 1001 (1971).

180. Cooper v. General Dynamics Convair Aerospace Div., 378 F. Supp. 1258 (N.D. Tex. 1976), *rev'd,* 533 F.2d 163 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977). Since unions generally expend some of their money for charitable purposes, the unions would thus earmark the employee's contribution for this purpose.

181. As another alternative, the employee could place an amount equal to union dues in trust to be given to a nonreligious charity. This arrangement resembles the one required by Congress under the health care institution exemption. Health Care Institution Act of 1974, 29 U.S.C. § 169 (Supp. V, 1975). Also, Congress has amended § 19 of the National Labor Relations Act, 29 U.S.C. § 169 (1980), to require a charity-substitute in cases such as this. In light of congressional approval of such a program, and union and judicial approval in other areas, this arrangement would probably not work an undue hardship on the employer or union. *See, e.g.,* Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978) (loss to union of $19 per month in union dues was de minimis and did not constitute undue hardship), *cert. denied,* 439 U.S. 1072 (1979); McDaniel v. Essex Int'l, Inc., 571 F.2d 338 (6th Cir. 1978). *See also* Ross, *Caesar and God: A Statutory Balance - Union Security and Religious Discrimination Under the Title VII Requirement of Reasonable Accommodation,* 3 INDUS. REL. L.J. 321, 356-57 (1979).

V. The *Hardison* Case

As the previous sections illustrate, prior to 1977 the lower courts had developed various interpretations of the accommodation rule, but the Supreme Court had not ruled on it. In 1977, the Court granted certiorari in *Trans World Airlines, Inc. v. Hardison.*[182] Hardison, a clerk in the Stores Department of TWA's maintenance and overhaul base, refused to work on his Sabbath after he embraced the tenets of the Worldwide Church of God. Attempts at accommodation produced temporary success because, at the time, he had sufficient seniority to avoid working on Saturday, his Sabbath.[183] When Hardison transferred to another job,[184] however, he lost his seniority and problems arose. Because he no longer had sufficient seniority to bid for Saturdays off, he had to work and the union refused to violate the seniority system to give him the days off. TWA rejected a four-day week proposal because it purportedly would impair critical functions of the airline. Consequently, TWA discharged Hardison who then brought a claim against TWA for religious discrimination. The district court ruled in favor of TWA and the union, holding that the union's duty to accommodate[185] did not require it to ignore the seniority system; that TWA had satisfied its reasonable accommodation obligation;[186] and that "the alternatives rejected by TWA would have created an undue burden on TWA's business."[187]

The appellate court affirmed the judgment for the union but reversed as to TWA, holding that TWA had not satisfied its duty to accommodate Hardison's religious needs.[188] The court held that an employer may not merely accept the role of a Pontius Pilate,[189] but must make an "effort to accommodate the employee's religious observances."[190] The court further held that the employer had the burden of demonstrating undue hardship,[191] and that TWA failed to meet this burden because it had not even attempted to find volunteer

182. 432 U.S. 63 (1977).

183. *Id.*

184. Hardison transferred to obtain a daytime shift because he had recently married.

185. The district court found that the EEOC's regulation requires accommodation by labor organizations, 375 F. Supp. at 882, and the court of appeals, in dicta, looked favorably on this holding but did not rule on it specifically, 527 F.2d at 42-43. A union duty was found to exist in McDaniel v. Essex International, Inc., 571 F.2d 338 (6th Cir. 1978).

186. Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877 (W.D. Mo. 1974).

187. Hardison v. Trans World Airlines, Inc., 527 F.2d 33, 39 (8th Cir. 1975).

188. 527 F.2d 22.

189. Pontius Pilate merely "washed his hands" of the blood of Jesus Christ, Matthew 27:24.

190. 527 F.2d at 39. The employee's right to transfer must not be restricted by his religious beliefs and practices. *Id.* "If Saturday work inevitably falls to the employees with lowest seniority," TWA might be effectively precluded "from ever hiring those . . . whose religious convictions preclude work from sundown on Friday until sundown on Saturday." *Id.* at 41-42 n.12.

191. *Id.* at 40.

substitutes for Hardison.[192]

The Supreme Court reversed, finding that TWA had made reasonable efforts to accommodate. The Court held that TWA was under no duty to arrange an exchange of shifts in contravention of the union contracts, stating that absent "a clear and express indication from Congress . . . an agreed-upon seniority system [need not] give way when necessary to accommodate religious observance."[193] The Court reasoned that the seniority system represented a neutral method of allocating the nonpreferred weekend work. If TWA abandoned this system to give Hardison Saturdays off, it would deprive other employees of their agreed-upon work preference primarily because they did not adhere to a religion that observed Saturday as the Sabbath. The Court made it clear that Title VII does not contemplate such unequal treatment. "The repeated, unequivocal emphasis of both the language and the legislative history of Title VII is on eliminating discrimination in employment, and such discrimination is proscribed when it is directed against majorities as well as minorities."[194] The Court elaborated:

> It would be anomalous to conclude that by "reasonable accommodation" Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far.[195]

The Court buttressed this interpretation by citing section 703(h) of Title VII, which immunizes certain otherwise prohibited differential treatment from Title VII attack when the differential treatment occurs pursuant to a bona fide seniority system.[196] The Court concluded that "absent a discriminatory purpose the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences."[197] Because the seniority system evidenced no discriminatory intent, the Court reasoned that TWA did not engage in an unlawful employment practice when it followed the dictates of its seniority system.

The *Hardison* Court further determined that Congress did not intend that an employer bear more than a de minimis cost to accommodate the religious needs of its employees.[198] Specifically, the Court held that the reasonable accommodation rule does not require

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192. *Id.* at 42.
193. 432 U.S. at 79.
194. *Id.* at 81.
195. *Id.*
196. 42 U.S.C. § 2000e-2(h) (1970). *See also supra* notes 174-76 and accompanying text.
197. 432 U.S. at 82.
198. *Id.* at 84. The Court declared, "[t]o require TWA to bear more than a de minimis cost in order to give Hardison Saturdays off is an undue hardship."

an employer to abridge a collective bargaining agreement, lose efficiency in plant operation, or pay overtime wages in order to accommodate the religious beliefs of its employees. The Court felt compelled to reach this result because any other interpretation would give special treatment to the employee who practiced a minority faith, thus discriminating against those employees who did not practice such a faith.[199]

Accordingly, the Supreme Court also rejected potential solutions that, unlike shift trading, arguably would not have violated the collective bargaining agreement. First, Hardison could have worked a four-day week with a worker from another department substituting for him on his Sabbath. Second, TWA could have replaced Hardison on Saturday by paying premium wages to another employee. The Supreme Court concluded that both solutions would have imposed an undue hardship on TWA, either because of the lost efficiency resulting from understaffing other departments or because of higher wage costs. The Court asserted that because the overriding purpose of Title VII was to eliminate discrimination in employment, the Court would not, in the absence of clear statutory language or legislative history to the contrary, "construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath."[200]

In a dissent highly critical of the majority's de minimis standard, Justice Marshall, joined by Justice Brennan, argued that by interpreting "undue hardship" as anything more than a de minimis cost, the majority in essence had held

> that although the EEOC regulations and the Act state that an employer must make reasonable adjustments in his work demands to take account of religious observances, the regulation and the Act do not really mean what they say. An employer, the Court concludes, need not grant even the most minor special privilege to religious observers to enable them to follow their faith.[201]

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199. The Court asserted that, like the "abandonment of the seniority system, to require TWA to bear additional costs when it did not incur such costs by giving other employees the days off they wanted would involve unequal treatment of employees on the basis of their religion. *Id.*

200. *Id.* at 85.

201. *Id.* at 86-87 (Marshall, J., dissenting). Justice Marshall continued:

> As a question of social policy, this result is deeply troubling, for a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their job. And as a matter of law today's result is intolerable, for the Court adopts the very position that Congress expressly rejected in 1972, as if we were free to disregard congressional choices that a majority of this Court think unwise.

Id. Justice Marshall also questioned whether the cost involved in *Hardison* exceeded the de minimis standard. He based this attitude on the lack of evidence in the record of loss of efficiency, and on the fact that the amount of overtime involved amounted to less than $150 for three months, when Hardison could have transferred back to his previous department and regained his seniority. *Id.* at 92 n.6.

Justice Marshall pointed out that allowing employers to reject an accommodation simply because it involves preferential treatment would render the EEOC regulation and the statute ineffective because, by definition, the accommodation issue arises only "when a neutral rule of general applicability conflicts with the religious practices of a particular employee."[202] To exempt the employee from the rule "will always result in a privilege being 'allocated according to religious beliefs'."[203]

The Supreme Court's decision in *Hardison* has significantly narrowed the employer's duty to accommodate in two basic ways. First, it has eliminated any accommodations that require virtually any additional expenses in either money or lost operating efficiency. Second, it has totally removed from consideration all accommodations that would discriminate against other employees.

Hardison involves several distressing implications. First, the Court seems to contradict the language of the reasonable accommodation rule and the legislative history concerning the reach of the rule to Sabbatarians. Second, the decision may discourage accommodation of religious beliefs because accommodation almost always imposes greater than de minimis costs. Finally, the decision apparently permits a collective bargaining agreement to determine the extent of the accommodation required of the employer.[204]

The language of the reasonable accommodation rule indicates that the employer's duty to reasonably accommodate an employee's religious needs does not terminate when the accommodation would require more than a de minimis expenditure. Congress adopted a requirement of reasonable accommodation unless *undue* hardship, not mere hardship, would result. The Court in *Hardison* equated "undue hardship" with "more than a *de minimis* cost," a questionable interpretation given the ordinary usage of the words.[205]

In applying *Hardison,* courts probably will rarely find a seniority system to be an independent source of religious discrimination in the absence of discriminatory intent. Rather, seniority provisions in

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202. *Id.* at 87.

203. *Id.* at 88. As Justice Marshall pointed out, the majority's analysis would seem to not require an accommodation even when *no* hardship would result, if the accommodation would afford a privilege to some employees because of their religious beliefs. *Id.*

204. Recent cases on the closely related topic of religious refusal to pay union dues reveal conflicting results. Two cases held that the employer must accommodate to the point of undue hardship. McDaniel v. Essex International, Inc., 571 F.2d 338 (6th Cir. 1978); Cooper v. General Dynamics Convair Aerospace Div., 533 F.2d 163 (5th Cir. 1976), *cert. denied,* 433 U.S. 908 (1977). One court held reasonable accommodation unconstitutional in light of the establishment clause. Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd on other grounds,* 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 444 U.S. 928 (1980).

205. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 93 n.6 (1977) (Marshall, J., dissenting). Black's Law Dictionary defines undue as "more than necessary; not proper; illegal. . . ." BLACK'S LAW DICTIONARY 1697 (4th ed. 1951).

collective bargaining agreements will serve to limit the types of accommodation available to employers. An employer may thus contract away his duty of reasonable accommodation by entering into a valid collective bargaining agreement. The effect on the employee whom the employer either discharged or did not hire because of his beliefs, however, is no less substantial than if he had been the victim of purposeful discrimination. Nevertheless, the Supreme Court has demonstrated its unwillingness, absent an express statutory mandate, to find that "an agreed upon seniority system must give way when necessary to accommodate religious observances."[206] The *Hardison* Court emphasized that it would not order preferential treatment for Sabbath observers without a more specific definition of the scope of reasonable accommodation.[207] Moreover, even if Congress should amend Title VII to require employers and unions to violate collective bargaining agreements to accommodate employees' religious needs, the Court may ultimately strike down the new provision because the Establishment Clause mandates that government maintain its neutrality by affording religious and nonreligious employees similar treatment.

The decision in *Hardison* also implies that in showing undue hardship the employer may consider, in addition to the accommodation in question, future accommodations he may have to make for other employees with the same religious belief. This holding effectively overrules much of the prior case law. Before *Hardison,* most courts supported the idea that overtime pay constituted a proper means of accommodation; they disagreed only on when the cost would become an undue hardship. More importantly, even the most liberal of these courts considered only the costs of accommodating the *individual* employee.

By requiring the employer to bear only a de minimis cost and allowing consideration of potential future accommodations in determining the cost, the Court has practically eliminated the duty to accommodate. In any large enterprise the possibility exists that more than one employee will belong to a particular faith or to another faith that observes the same Sabbath. More importantly, other employees may possibly convert at a later date. Therefore, any decision involving an accommodation for one employee must be premised on the assumption that it will also apply to others.

The Court also apparently held that the employer's duty to accommodate does not authorize discrimination against other employees, regardless of an undue hardship. This determination focuses on the statutory requirement that the employer, not the fellow employ-

206. 432 U.S. at 79.
207. *Id.* at 85. *See supra* text accompanying note 199.

ees, make the accommodation. In so holding, the Court appears to have disregarded the legislative history of the 1972 amendment to Title VII, which contemplates unequal treatment of employees on the basis of their religion by rearranging work schedules to allow Sabbatarians time off from work to observe their Sabbath.[208] Congress obviously recognized that accommodating some employees' religious practices would result in unequal treatment to other employees.[209]

The Supreme Court's narrow interpretation of the reasonable accommodation requirement in *Hardison* deals an unfortunate blow to religious freedom. Future decisions will determine, however, whether *Hardison* is, as Justice Marshall portrayed it, a "fatal blow" to all efforts to accommodate. The Court's construction seems to leave reasonable accommodation more a rule of preference than a requirement. The message to employers appears to be that if it is possible to accommodate their employees' religious beliefs, then they should do so. Further litigation will spell out the parameters of this reinterpreted reasonable accommodation doctrine. Specifically, the Court's vaguely defined "de minimis cost" rule will have to be applied as the undue hardship test has been, on a case-by-case basis.

Although some cases since *Hardison* have found undue hardship or a failure to make a reasonable attempt to accommodate,[210] the lower courts uniformly understand *Hardison* to require little in the way of accommodation before undue hardship results. The decision by the Sixth Circuit Court of Appeals in *Cummins v. Parker Seal Company*[211] most clearly exemplifies this understanding. In 1975, this court had held that the employee's religious needs could be accommodated by substitution and rescheduling of other employees, and that the objections and complaints of fellow employees did not constitute undue hardship. An equally divided Supreme Court affirmed the decision in 1976,[212] but subsequently vacated it on rehearing in 1977[213] and remanded it for further consideration in light of *Hardison.* In a brief per curiam opinion, the court of appeals

208. 118 CONG. REC. 705 (1972). Senator Randolph's remarks in proposing the 1972 amendment to Title VII, uncontradicted in subsequent debates, also support the proposition that Congress intended to permit unequal treatment for the benefit of Sabbatarian employees.

209. Commonly, an exemption or privilege granted by Congress to one person or group will result in a burden on other persons or groups. For example, excusing conscientious objectors from military conscription effectively requires nonobjectors to serve instead. *See, e.g.,* Selective Draft Law Cases, 245 U.S. 366, 389-90 (1918).

210. Brown v. General Motors Corp., 601 F.2d 956 (8th Cir. 1979); Niederhuber v. Camden County Vocational & Tech. School Dist. Bd. of Educ., 498 F. Supp. 273 (D.N.J. 1980); Padon v. White, 465 F. Supp. 602 (S.D. Tex. 1979); Kenny v. Ambulatory Centre of Miami, 400 So. 2d 1262 (Fla. App. 1981).

211. 516 F.2d 544 (6th Cir. 1975).

212. 429 U.S. 65 (1976).

213. 433 U.S. 903 (1977).

stated[214] that *Hardison* required affirmance of the judgment of the district court, which had held that any further attempt by the employer to accommodate would cause undue hardship. Recent cases in several circuits,[215] and in the state courts,[216] seemingly apply this rather undemanding approach.

Hardison left several questions unanswered. One question concerns the extent to which the *Hardison* decision applies to unions as distinguished from employers. Even though the union in that case technically prevailed in the court of appeals, the Supreme Court granted its petition for certiorari because the lower court decision had assumed that the union should be required to waive the collective bargaining agreement to accommodate Hardison.[217] The Court did not, however, explicitly discuss the union's duties, stating merely that "since we reverse the judgment against TWA, we do not pursue the union's status in the Court."[218] This language suggests that the holding applies to unions as well as employers.[219] Apparently, unions are relieved from (or burdened with) the same accommodation duty as employers.

Another unanswered question concerns whether the protection of vested seniority rights extends to other collective bargaining provisions. The *Hardison* Court premised its protection of seniority rights on the two following grounds: that section 703(h) expressly requires intentional discrimination to render the application of a seniority system an unfair employment practice *and* that accommodation would require inequality of treatment of employees. Thus, whether this provision extends to other terms of collective bargaining agreements absent the specific statutory language of section 703(h) that is directed *only* to seniority provisions remains unclear. Nevertheless, because the Court applied its equality-of-treatment approach in considering alternate accommodations not regulated by an agreement, any term included in a collective bargaining agreement that would produce unequal treatment may be protected from the reasonable accommodation requirement.[220]

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214. 561 F.2d 658 (6th Cir. 1977).

215. Brener v. Diagnostic Center Hosp., 28 Fair Empl. Prac. Cas. (BNA) 907 (5th Cir. 1982); Ward v. Allegheny Ludlum Steel Corp., 560 F.2d 579 (3d Cir. 1977); Jordan v. North Carolina Nat'l Bank, 565 F.2d 72 (4th Cir. 1977); Huston v. Local 93, UAW, 559 F.2d 477 (8th Cir. 1977).

216. Olin Corp. v. The Fair Employment Practices Comm'n, 67 Ill. 2d 466, 367 N.E.2d 1267 (1977).

217. 432 U.S. at 70-71 n.5.

218. *Id.*

219. This conclusion is further bolstered by courts holding that other provisions of Title VII apply to unions. Hardison v. Trans World Airlines, Inc., 527 F.2d at 42.

220. The agency shop clause, found in many collective bargaining agreements, that requires each employee to contribute to the union, illustrates such a provision. The courts have found these provisions to conflict with strictly held religious views barring support of labor

VI. Constitutional Implications

A. Does the Reasonable Accommodation Rule Violate the Establishment Clause?

While the *Hardison* Court chose not to determine the constitutionality of the reasonable accommodation rule, the dissent, in a brief discussion, asserted that

> the constitutionality of the statute is not placed in serious doubt simply because it sometimes requires an exemption from a work rule. Indeed, this Court has repeatedly found no Establishment Clause problems in execpting religious observers from state-imposed duties, even when the exemption was in no way compelled by the Free Exercise Clause.[221]

Despite Justice Marshall's assurance, however, arguably the rule does violate the Establishment Clause.

The first amendment commands that "Congress shall make no law respecting an establishment of religion."[222] The first amendment also commands that "[Congress shall make no law] prohibiting the free exercise [of religion]."[223] There exists a tension between the Establishment Clause and the Free Exercise Clause. As Justice Brennan articulated this tension: "There are certain practices conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment."[224]

The exemptions and privileges granted to resolve direct and indirect conflicts between law and religion theoretically raise questions involving both religion clauses. When the law that creates the conflict derives historically from or parallels a religious rule (*e.g.*, Sunday closing), enforcement of the religiously colored law arguably violates the Establishment Clause. Similarly, when employers grant a conflict-resolving exemption, but limit it to certain individuals, the

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unions. *See, e.g.*, Yott v. North Am. Rockwell Corp., 501 F.2d 398 (9th Cir. 1974), *cert. denied*, 445 U.S. 928 (1975).

221. 432 U.S. 63, 90 (1977) (Marshall, J., dissenting).

222. U.S. CONST. amend. I. Most Establishment Clause challenges reviewed by the Court in recent years have dealt with education—either state aid to private education or prayer in the public schools. In 1947, Everson v. Board of Educ., 339 U.S. 1 (1947), began a flood of education cases that is yet to abate. The Court in *Everson* upheld the validity of state reimbursement for bus fare to parents of private school students. *Id.* at 17.

Before 1947, only a few Establishment Clause cases reached the Court, and the only recurring theme in those cases perhaps was the principle that the state cannot interfere in or act to solve religious disputes, even to determine ownership rights in property. *See, e.g.*, Watson v. Jones, 80 U.S. (13 Wall) 679 (1871) (civil courts cannot decide which of two rival factions has the right to operate a local church); Terrett v. Tyler, 13 U.S. (9 Cranch) 43 (1815) (courts cannot dissolve a religious corporation and distribute its assets).

223. U.S. CONST. amend. I.

224. Abington School Dist. v. Schempp, 374 U.S. 203, 299 (1963) (Brennan, J., concurring). For a discussion of the conflict between the Free Exercise Clause and the Establishment Clause, see also Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968).

limitation arguably constitutes an establishment of religion.[225] In conflict cases, however, the courts tend to focus on the Free Exercise Clause while paying little or no attention to the Establishment Clause.

Often, as in *Hardison,* the courts never reach the constitutional question because they resolve the cases on the issues of reasonable accommodation and undue hardship. Most courts that have ruled on the constitutional question have upheld the constitutionality of section 2000e(j).[226] In analyzing the constitutional issue, the courts have generally applied a three-pronged test set forth in *Committee for Public Education and Religious Liberty v. Nyquist*[227] as follows: (1) Does the statute in question reflect a clearly secular legislative purpose?[228] (2) Does the statute have a primary effect that neither advances nor inhibits religion?[229] and (3) Does the statute avoid excessive governmental entanglement with religion?[230]

1. Secular Purpose.—To satisfy the test's "clearly secular legislative purpose" requirement, a law must be "adequately supported by legitimate, nonsectarian state interests."[231] The legislative history of section 2000e(j) may be construed to indicate that it fails this test. Section 2000e(j) began as an amendment to the Equal Employment Opportunities Act of 1971. Its sponsors intended the bill to have an exclusively religious character in that it required employers to remain flexible in establishing work schedules for employees who practice a Sabbatarian religion. Thus, section 2000e(j)'s avowed purpose consisted of forcing the government to abandon its neutral stance with regard to some religious practitioners.[232]

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225. *See, e.g.,* Gillette v. United States, 401 U.S. 437 (1971). In other cases, though theoretically a claim for exemption on religious grounds involves an establishment of religion, the Court has focused, and presumably will continue to focus, on the Free Exercise Clause. *See, e.g., In re* Jenison, 375 U.S. 14 (1963); Sherbert v. Verner, 374 U.S. 398 (1963); Braunfeld v. Brown, 366 U.S. 599 (1961); Board of Educ. v. Barnette, 319 U.S. 624 (1943).

226. Anderson v. General Dynamics Convair Aerospace Div., 648 F.2d 1247 (9th Cir. 1981); Tooley v. Martin Marietta Corp., 648 F.2d 1239 (9th Cir. 1981), *cert. denied,* 102 S. Ct. 671 (1982); Nottleson v. Smith Steel Workers, 643 F.2d 445 (7th Cir. 1981), *cert. denied,* 102 S. Ct. 587 (1982); Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Hardison v. Trans World Airlines, Inc., 527 F.2d 33 (6th Cir. 1975), *rev'd on other grounds,* 432 U.S. 63 (1977); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *rev'd on other grounds,* 433 U.S. 903 (1977); Reid v. Memphis Publishing Co., 468 F.2d 346 (6th Cir. 1972); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Jordan v. North Carolina Nat'l Bank, 399 F. Supp. 172 (W.D.N.C. 1975), *rev'd on other grounds,* 565 F.2d 72 (4th Cir. (1977). *Contra* Gavin v. People's Natural Gas Co., 464 F. Supp. 622 (W.D. Pa. 1979), *vacated,* 613 F.2d 482 (3d Cir. 1980); Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977), *aff'd on other grounds,* 602 F.2d 904 (9th Cir. 1979), *cert. denied,* 444 U.S. 928 (1980).

227. 413 U.S. 756 (1973).

228. Epperson v. Arkansas, 393 U.S. 97 (1968).

229. Abington School Dist. v. Schempp, 374 U.S. 664 (1970); McGowan v. Maryland, 366 U.S. 420 (1961).

230. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

231. Committee of Pub. Educ. v. Nyquist, 413 U.S. 756, 773 (1973).

232. In proposing the amendment, Senator Jennings Randolph, section 2000e(j)'s primary

Despite its avowed support of religion, defenders of section 2000e(j) could argue its constitutionality by the supposition of two "secular primary purposes:" that Congress passed it to strengthen the prohibition of discrimination found elsewhere in the Civil Rights Act, and that Congress intended its passage to effectuate the Free Exercise Clause of the Constitution. Section 2000e(j), however, seems to *mandate* discrimination rather than cure it. It "requires an overt preference for the religious beliefs of certain employees . . . even if [the] accommodation [of their beliefs] is detrimental to other employees."[233] To accommodate a Sabbatarian's religiously prescribed work schedule, for example, other employees may have to work one more weekend day. While such an accommodation could legally comprise a part of a private agreement between an employer and its employees, the Establishment Clause, enforced through the primary effect test, seems to forbid the government from passing laws mandating any such arrangement that favors one set of believers.

Further, a court apparently cannot follow the example of the draft cases and interpret section 2000e(j) in a nondiscriminatory manner.[234] Although an atheist or agnostic may hold secularly based beliefs that are as strongly opposed to war as some religious beliefs, no secular practice that might conflict with a given work schedule can be treated as a nonreligious equivalent to mandatory observance of the Sabbath. Because they lack religious practices to accommodate, nonbelievers do not enjoy the protection of section 2000e(j) and must bear the burden of flexible work schedules. Thus, section 2000e(j) seems to possess the unconstitutional primary purpose of advancing religion.

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sponsor, specified that he felt the Sabbatarian faiths—Orthodox Jews, Seventh Day Adventists, and Seventh Day Baptists—would benefit from the bill, estimating total membership of these faiths at about 1.18 million people throughout the United States. His comments were quite partisan:

> [T]here has been a partial refusal at times on the part of employers to hire or to continue in employment employees whose religious practices rigidly require them to refrain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations because of the situation to which I have just directed attention.
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> . . . .
>
> My own pastor in this area . . . has expressed his concern and distress that there are certain faiths that are having a very difficult time, especially with the younger people, and understandably so, with reference to a possible inability of employers on some occasions to adjust work schedules to fit the requirements of the faith of some of their workers.

118 CONG. REC. 705 (1972).

233. Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782, 790 (S.D. Cal. 1980), 648 F.2d 1247 (9th Cir. 1981). *See also* Draper v. United States Pipe & Foundry Co., 527 F.2d 515 (6th Cir. 1975); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975), *vacated,* 433 U.S. 903 (1977); Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972).

234. Welsh v. United States, 388 U.S. 333 (1979).

Senator Randolph's purpose in adding the section, however, should not by itself invalidate the amendment.[235] While the lack of a secular legislative purpose theoretically invalidates a statute, the Supreme Court has seldom relied on the legislative purpose to strike down a challenged law, but rather has seemingly indulged every presumption of a proper legislative purpose. In the Sunday closing law cases,[236] for example, the Court upheld the validity of the legislative purpose because it provided for a uniform day of rest.[237] The Court has even recognized several programs to aid nonpublic schools, although held unconstitutional on other grounds, as having valid secular purposes, *e.g.,* advancement of secular education, promotion of pluralism and diversity, concern about overcrowding in public schools should nonpublic schools fail, and preservation of a safe and healthy educational environment for all schoolchildren.[238] Only the prohibition against teaching the theory of evolution in *Epperson v. Arkansas*[239] and the prayer in public schools in *Abington School District v. Schempp*[240] fell because of an impermissible legislative purpose. This general judicial deference, compounded by the uncertainty of the other legislators' intentions, makes it doubtful that Senator Randolph's intention standing alone would necessitate the invalidation of the law.[241]

2. Primary Effect.—The second part of the *Nyquist* test requires that the statute's primary effect neither advance nor inhibit

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235. Senator Randolph's purpose becomes less clear, however, because he also said:

> The term "religion" as used in the Civil Rights Act of 1964 encompasses, as I understand it, the same concepts as are included in the first amendment - not merely belief, but also, conduct; the freedom to believe, and also the freedom to act.
>
> I think in the Civil Rights Act we thus intended to protect the same rights in private employment as the Constitution protects in Federal, State or local governments.

118 CONG. REC. 705 (1972).

In the brief debate, Senator Williams (N.J.) added: "In dealing with the free exercise thereof, really, this promotes the constitutional demand in that regard." *Id.* at 706.

236. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Market, 366 U.S. 617 (1961).

237. McGowan v. Maryland, 366 U.S. 420, 448 (1961). The Court reached this conclusion in spite of the historical connection between Sunday closing laws and religious observances, and the fact that one section of the law was cloaked in terms of "profan[ing] the Lord's day." *Id.* The Court noted that legislation is not unconstitutional merely because it coincides or harmonizes "with the tenets of some or all religions," so long as temporal reasons "wholly apart from any religious considerations" support such legislation. *Id.* at 442.

238. Meek v. Pittinger, 421 U.S. 349 (1975); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

239. 393 U.S. 97, 107 (1968).

240. 374 U.S. 203 (1963).

241. The court in Cummins v. Parker Seal Co., 516 F.2d 544, 553 (6th Cir. 1975), *vacated,* 433 U.S. 903 (1977), speaking of section 2000e(j), stated that "the argument of one Senator that the proposed legislation would assist a particular pastor and religious group does not require the conclusion that Congress enacted the legislation to promote and support a particular religion." *Id.*

religion. Although seemingly straightforward, primary effect represents the most elusive concept of the three parts of the *Nyquist* test. Its limits do not expressly appear anywhere. Analyzing the Supreme Court's applications of the primary effect requirement through the years, however, helps define its dimensions.

Two clear principles emerge. First, the state may not directly support religious activity. In the public schools, for example, prayers and devotional Bible-reading, even if voluntary, may not comprise part of the curriculum because of their inherently religious nature.[242] The second principle, however, provides that an incidental benefit does not signify a per se constitutional violation.

Arguably, the government through the reasonable accommodation rule is sanctioning those religions which demand that followers not work at certain times. The religion itself may benefit in the form of higher attendance at services and a corresponding increase in the contents of the collection plate. Athiests find themselves the most disadvantaged. Those who believe in a Sunday Sabbath could assert the provision to escape working on Sundays, but atheists may not avail themselves of the amendment at all.[243] Because the statute disadvantages nonbelievers, and benefits only a small number of religious groups, the courts could declare the statute unconstitutional as fostering religious beliefs.[244]

Applying these principles, if the reasonable accommodation rule requires an employer to vary from the terms of a facially neutral collective bargaining agreement to accommodate an employee's religious observances when other employees who do not claim religious exemption do not enjoy similar treatment, then the statute prefers religion over nonreligion. Therefore, if courts interpret section 2000e(j) and the reasonable accommodation rule to require preferential treatment of religious employees, the primary effect will advance religion, and violate the first amendment mandate of government

242. In Abington School Dist. v. Schempp, 374 U.S. 203, 223-24 (1963), the Court considered two companion cases and reviewed laws requiring the reading of Bible verses and the recitation of the Lord's Prayer at the beginning of each school day in the public schools of Pennsylvania and Baltimore. Although proponents defended the laws in each instance as moral education and the study of literature, the Court noted the "pervading religious character" of such exercises and invalidated each law.

243. An employee may have very strong nonreligious reasons for not wanting to work on Saturday. For example, poor health may restrict a person to a shorter week, or restrictions may prevent a divorced parent from visiting a child on all but a certain day of the week.

244. Based on United States v. Seeger, 380 U.S. 163 (1965) and Welsh v. United States, 398 U.S. 333 (1970), an atheist should enjoy the same protection as those who hold religious beliefs. Yet this is rarely the case. Only one case has allowed an atheist to avail herself of the amendment. In Young v. Southwestern Sav. & Loan, 509 F.2d 140 (5th Cir. 1975), the court determined an atheist to be constructively discharged for failing to attend monthly meetings as required by her employer. She did not attend because the meetings always began with a prayer and the employer refused to permit her to arrive late. This case represents an anomaly unlikely to occur often. The primary purpose of the amendment was to aid Sabbatarian beliefs and to date that has been its overwhelming use.

neutrality. The *Hardison* Court recognized the problem. In holding that Title VII does not "require an employer to discriminate against some employees in order to enable others to observe their Sabbath,"[245] the majority recognized the potential unconstitutionality of the reasonable accommodation requirement.[246]

Some incidental benefit to religion, however, does not necessarily render the statute unconstitutional. In *McGowan v. Maryland,*[247] the Court determined that while the original purpose of Sunday closing laws had been to aid religion, those laws had acquired a valid secular purpose.[248] Although Sunday closing laws continue to benefit religion with a Sunday Sabbath, the benefit was permissible because it was only an *incidental* effect of otherwise desirable, secular legislation.[249]

In *Anderson v. General Dynamics,*[250] the court ruled that section 2000e(j) violated the primary-effect part of the *Nyquist* test, because the law constituted "a preconceived and direct benefit to particular religions."[251] The court continued, "[t]he accommodation requirement discriminates between religion and nonreligion by favoring only those employees with 'religious' beliefs. In addition, the requirement discriminates among religions by favoring only those beliefs which require modification of an employer's work rules."[252] Arguably, however, any benefit to religion conferred by section 2000e(j) is as incidental as the benefit conferred in the Sunday closing law cases. Neither religious activity nor religious institutions enjoy direct sponsorship or subsidization; rather, the purpose and primary effect of the legislation is to inhibit discrimination. Furthermore, as the first *Cummins v. Parker Seal Co.*[253] appellate decision noted in finding the statute constitutional, a Sabbatarian freed from work on Saturday because of his employer's accommodation may or may not attend church; likewise, he may or may not contribute to the collection. Thus, any benefit flowing to religion from the accommo-

245. 432 U.S. at 85.

246. Justice Marshall, in his dissent, also acknowledged that a constitutional problem would exist if the statute were construed to require employers to assume significant costs to aid the religious observer. 432 U.S. at 90.

247. 366 U.S. 420 (1961) (*McGowan* was the *Nyquist* Court's example of permissible advancement of religion).

248. The Court traced the history of Sunday closing laws from thirteenth century England to present-day America. *Id.* at 421-39. Nonreligious reasons for the laws expressly emerged in the eighteenth century. *Id.* at 433-34.

249. *Id.* at 445. The Court added: "To say that the states cannot prescribe Sunday as a day of rest . . . solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State." *Id.*

250. Anderson v. General Dynamics Convair Aerospace Div., 489 F. Supp. 782, 790 (S.D. Cal. 1980), *rev'd,* 648 F.2d 1247 (9th Cir. 1981).

251. 489 F. Supp. at 790.

252. *Id.*

253. 516 F.2d 544 (6th Cir. 1975), *vacated,* 433 U.S. 903 (1977).

dation bears only an incidental relationship to section 2000e(j).[254]

3. Excessive Entanglement.—The third part of the *Nyquist* test requires that the statute avoid excessive governmental entanglement with religion. Potentially, any claim for accommodation under Title VII may involve a judicial or administrative inquiry into the "religious" quality of the claimed belief or practice. The court in *Gavin v. People's Natural Gas Company*[255] concluded that such an inquiry did involve excessive entanglement and thus conflicted with the Establishment Clause. The court also analyzed two possible methods of avoiding this problem, but concluded that the result of the case would not change. First, the term religion could be defined to include anything an employee considers religious.[256] The court objected to such an expansive definition of religion because it would create havoc in the workplace. Additionally, "such a reading [could] create due process problems for employers who would have no way of implementing such a broad and vague scheme wherein they [are] charged with an affirmative duty to accommodate."[257] Second, the court could decide that the employee's belief did not constitute religion as a matter of law.[258] However, the court believed that this determination would require interpreting the statute to protect only common religious beliefs and such a narrow interpretation would raise serious Establishment Clause objections.[259] The *Gavin* court ultimately refused to decide whether or not the employee's belief was religious[260] because of the serious constitutional issues inherent in such a determination.

A majority of the court in *Cummins v. Parker Seal Company*[261] found no such difficulty with the entanglement question, noting that determining the sincerity of an employee's religious beliefs would not require any more governmental involvement than a state determination of a purported church's eligibility for a property tax exemption.[262]

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254. 516 F.2d at 553.

255. 464 F. Supp. 622 (W.D. Pa. 1979), *vacated on other grounds,* 613 F.2d 482 (3d Cir. 1980).

256. *Id.* at 632. Redefining "religion" essentially mirrors the approach applied in the conscientious objector cases.

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.* at 633. The court consequently dismissed the complaint.

261. 516 F.2d 544 (6th Cir. 1975), *vacated,* 433 U.S. 903 (1977).

262. *Id.* at 554, (citing Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970)). The court explained: "[T]he EEOC and the courts will have to determine simply whether the employer has made a reasonable accommodation and whether any undue hardship will result. These issues will be considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion." *Id.* at 553-54.

B. *Establishment vs. Free Exercise*

Over the years, courts have "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[263] In spite of the absolute prohibitions of the clauses, the Supreme Court has recognized that

> this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and, consequently, cases arising under these Clauses have presented some of the most perplexing questions to come before this Court.[264]

With total separation considered impossible, the government must sometimes accommodate religious interests despite the Establishment Clause. The argument that section 2000e(j) implements the Free Exercise Clause and that protection of the free exercise interests outweighs the statute's favoritism both toward religions requiring accommodation and also toward believers in general may cure the Establishment Clause defects in section 2000e(j). The Supreme Court has taken this approach in approving governmental accommodations and benefits based on religion when the result has been an exclusive benefit to religion. These accommodations and benefits survived Court scrutiny because, while the government must avoid promoting religion, it must also not inhibit it. For example, in *Sherbert v. Verner,*[265] a woman was denied unemployment compensation on the ground that she failed to accept suitable work. In fact, employers would not hire her because of her refusal, on religious grounds, to work on Saturday. The Court found that providing her with the unemployment benefits would not foster the establishment of her religion, but denying her the compensation would violate her right of free exercise.[266]

While a plausible attack can be made on the constitutionality of section 2000e(j), it is equally reasonable to argue that the section

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263. Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

264. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 760 (1973). The Court has also explained:. "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). *See also* Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor,* 37 GEO. WASH. L. REV. 223 (1968).

265. 374 U.S. 398 (1963).

266. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972). Members of the Amish sect were convicted of violating a Wisconsin law compelling attendance at school until age sixteen. The Amish defendants, claiming their religion prohibited high school attendance, refused to send their children to high school. The Court found that, although "the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the establishment clause" could not be ignored, Wisconsin's law impinged upon the free exercise of the Amish religion. *Id.* at 220-21.

protects the free exercise of religion and does not "establish" religion. As the Supreme Court stated in *Walz v. Tax Commission:*[267] "[F]or the men who wrote the religion clauses . . . the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[268] Clearly the reasonable accommodation rule requires no sponsorship or financial support, the "primary evil" at which the Establishment Clause was aimed,[269] or active involvement of the government in religion.

VII. Conclusion

The different interpretations of "undue hardship" by the Sixth Circuit in *Cummins I* and by the Supreme Court in *Hardison* illustrate a sharp contrast. The Sixth Circuit in *Cummins I* showed a deference to employees and set forth a strenuous standard for employers to meet. With respect to the complaints of other employees, the court indicated that only evidence of "chaotic personnel problems" would establish undue hardship.[270] Derived from dicta in *Dewey,*[271] approved by the EEOC[272] and adhered to by the Sixth Circuit subsequent to *Cummins I,*[273] this exacting standard has never been met. With the *Hardison* decision and its interpretation of undue hardship as anything more than de minimis costs, the Sixth Circuit's standard will not likely be applied again. The de minimis cost interpretation cuts harshly against the employee because an employer apparently must no longer expend much effort to accommodate. In effect, the Court has interpreted "undue" out of "undue hardship." The two cases taken together evince a significant shift in emphasis from the rights of religious employees, as depicted in *Cummins I,* to the prerogatives of employers and employees[274] who do not request accommodation, as illustrated in *Hardison.*

Several questions remain to confront employers concerning their obligations under section 2000e(j). Although the *Hardison* Court delineated what is *not* required, it failed to clarify how an employer must comply with the statute. Clearly, an employer cannot

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267. 397 U.S. 664 (1970).

268. *Id.* at 668.

269. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

270. 516 F.2d at 550.

271. Dewey v. Reynolds Metals Co., 429 F.2d 324, 339 (6th Cir. 1970), *aff'd per curiam by an equally divided Court,* 402 U.S. 689 (1971).

272. EEOC Dec. No. 6310 (1971). EEOC Dec. No. 6202 (1970).

273. Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 521 (6th Cir. 1975).

274. In many cases, other employees, not the employer, suffer undue hardship. One such example is the employee who waited for many years to acquire sufficient seniority to avoid weekend work, and now must work weekends because of someone else's religious beliefs.

refuse to make *any* effort on the employee's behalf.[275] Any negotiated accommodation that results in no greater employment benefits in the aggregate for the religious employee should prevail. For example, TWA allowed Hardison his religious holidays off in return for his working on days that constituted religious holidays for other employees. This accommodation imposed no burden to the employer or the other employees that would violate the inequality of treatment restriction even though it theoretically gave Hardison special treatment on the basis of his religion. In addition, the employer may have to incur some minimal costs, but the costs should not rise to the level of financing an additional day off for an employee because of his religious requirements. In sum, an employer must shoulder only minimal burdens in an effort to accommodate.

Hardison seems to reflect a strong underlying concern regarding the constitutionality of the duty to accommodate religious beliefs in employment. The *Hardison* Court may, in effect, have adopted the *Cummins* dissent which argued that, to be constitutional, accommodation must carry little meaning in employment decisions. Thus, while the *Hardison* Court accepted the existence of the employer's duty to accommodate, the Court directed that duty toward maintaining employer neutrality rather than toward conferring employee privilege. Nevertheless, by deciding *Hardison* on statutory grounds, the Court left the basic constitutional question unanswered. Given the past demonstrations of congressional willingness to expand Title VII protections for nontraditional Sabbatarians, the Court may have to address this question in the future if Congress acts to "correct" the Court's statutory interpretations.

The exercise of religion represents one of the fundamental liberties Americans enjoy. On the other hand, the employment relationship constitutes one of the most important parts of any working American's life. For the great majority of people who worship on Sunday, these two important aspects of life do not conflict, for Sunday is the "working man's" as well as the "religious man's" day off. But for employees who do not worship on Sunday,[276] the two conflict, and these persons must choose between religion and employment. As a matter of fairness to such employees, accommodating their religious beliefs does no more than grant them the same privileges enjoyed by others. Any resulting inconvenience to others would most often, if not always, be outweighed by the hardship on the employee seeking accommodation if the employer fails to accommodate.

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275. *See* Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); *see also* Jordan v. North Carolina Nat. Bank, 399 F. Supp. 172 (W.D.N.C. 1975), 565 F.2d 72 (4th Cir. 1977).

276. The employment relationship and religion also clash for those employees who seek any other kind of religious accommodation.